Supreme Court, U.S.
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No. ——

In The

# Supreme Court Of The United States

STATE OF CONNECTICUT,

*Petitioner,*

v.

MICHAEL SPENCER,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE CONNECTICUT SUPREME COURT CONCLUDING THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID SECOND TIER PROTECTIVE SWEEP UNDER THE FOURTH AMENDMENT IS CONTRARY TO WELL ESTABLISHED CONSTITUTIONAL JURISPRUDENCE AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND EVERY FEDERAL CIRCUIT COURT OF APPEAL?

II. WHETHER THE DECISION OF THE CONNECTICUT SUPREME COURT CONCLUDING THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID FIRST TIER PROTECTIVE SWEEP UNDER THE FOURTH AMENDMENT IS IN DIRECT CONFLICT WITH THE DECISIONS OF SEVERAL FEDERAL CIRCUIT COURTS OF APPEAL, INCLUDING THE SECOND CIRCUIT?

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## OPINION BELOW

The Connecticut Supreme Court reversed the respondent's conviction for possession of a narcotic substance, and remanded the case to the trial court with direction to grant the respondent's motion to suppress, in State v. Spencer, 268 Conn. 575 (2004) (hereinafter State v. Spencer, at A-1).

## JURISDICTION

The decision below was released on April 27, 2004. By a four to three vote, the petitioner's motion for reargument and reconsideration en banc was denied on June 2, 2004. See Appendix at A-42. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rules 10(b) and 10(c).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The respondent Michael Spencer was arrested during a police drug sting when he accepted delivery of a Federal Express parcel containing marijuana. The parcel was not addressed to the respondent but had been sent to the three family apartment building where the respondent and his wife resided on the second floor. The police arrested the respondent in the first floor front hallway. The respondent's apartment was at the top of a flight of twelve to fourteen stairs. The police observed that the door to the respondent's apartment was ajar. Incident to the arrest the police executed a protective sweep of the respondent's second floor apartment, and observed in plain view a quantity of crack cocaine and a crack pipe. At trial, the respondent challenged the legality of the protective sweep and sought to suppress the crack cocaine seized as a result.

### A. The Police Sting Operation

On April 12, 2000, the Shelby County, Tennessee sheriff's office intercepted a parcel containing twenty seven pounds of marijuana. State v. Spencer, at A-5. The parcel was addressed to "Sylvia Sloan," at 16 Lipton Place, in Stamford, Connecticut. Id. Nobody by that name was known to reside at the address. Surveillance of the premises revealed it to be a multifamily house. Id. Police records disclosed that in the past

Stamford police had responded to a domestic disturbance call that involved the respondent and his wife, who both resided on the second floor. Id.

On April 13, 2000, Stamford police made a "controlled delivery" of the parcel to the Lipton Place address. Id. at A-5 to A-6. A police officer posing as a Federal Express deliveryman rang the doorbell to the first floor apartment and knocked on the outer front door of the building. Id. at A-6. The respondent opened the door. Id. The respondent verified the address and when informed that the parcel was addressed to "Sylvia Sloan," he first repeated the name sotto voce and then accepted the parcel. Id. He next closed the front door. Id. As the ersatz Federal Express driver walked away, the respondent came back outside without the parcel, and peered in both directions along the street. Id.

Four Stamford police officers, having observed the transaction, immediately approached the residence and encountered the respondent in the front doorway. Id. at A-6 to A-7. They brought him into the first floor hallway, and observed the Federal Express parcel on a shelf. Id. The officers informed the respondent of his Miranda rights and arrested him. Id. The respondent denied knowledge of the contents or anybody named Sylvia Sloan, and claimed he innocently accepted the parcel. Id.

From the hallway the officers observed that the door to the respondent's second floor apartment was ajar. Id. at A-7. A stairway of twelve to fourteen steps led to the door. Id. One of the officers asked the respondent if anyone was inside the apartment, but the respondent did not answer. Id. Two officers ascended the stairs and entered the apartment, in their belief effecting a protective sweep not requiring a warrant. Id. In plain view in the bedroom they observed a small amount of crack cocaine and a crack pipe. Id.

## B. The Suppression Hearing

At trial the respondent filed a motion to suppress the evidence of crack cocaine on the ground that it had been obtained as the result of an unconstitutional warrantless search. State v. Spencer, at A-7 to A-8. At the suppression hearing, the four arresting officers testified. Id. One officer testified that the respondent was unresponsive and nervous, and that the apartment was searched because of the belief that another person was inside the apartment, and out of concern that weapons might be present. Id. at A-8 to A-9. This officer testified that such sweeps were standard procedure to ensure the safety of police officers. Id.

A second officer testified that because of the respondent's refusal to tell the officers whether another person was inside the apartment, he and another officer effected a "protective search" of the apartment, limited to places where a person could conceal himself or herself. Id. at A-9 to A-10. A third officer testified that he had been involved in numerous protective sweeps in such situations, i.e., where an individual had been arrested outside of an apartment. Id. at A-10. The fourth officer testified that the building was located in an area known for a high level of drug activity. Id.

At the suppression hearing, the prosecution argued that the warrantless search was justifiable to protect the safety of the officers and to prevent the destruction of evidence. Id. at A-10. The trial court, relying upon Maryland v. Buie, 494 U.S. 325, 110 S.Ct. 1093 (1990), denied the motion to suppress. Id. at A-11.

## C. The Decision Below

The State of Connecticut charged the respondent with one count of possession of marijuana with intent to sell and one count of possession of crack cocaine. A jury of six returned a guilty verdict to the count charging possession of crack cocaine, and a not guilty verdict to the count charging possession of marijuana with intent to sell.

The respondent appealed to the Connecticut Supreme Court. A four justice majority agreed that the warrantless search violated the defendant's rights under the Fourth Amendment to the federal Constitution. State v. Spencer, at A-11 to A-27. The dissent believed that the majority's opinion directly conflicted with the Second Circuit's decision in United States v. Oguns, 921 F.2d 442 (2d Cir. 1990). State v. Spencer, A-26 to A-41.

The majority concluded that the warrantless search did not qualify as a second tier protective sweep. Id. at A-17 to A-26. Specifically, the majority held that these particular police officers lacked sufficiently specific and articulable facts to support a reasonable belief that the respondent's apartment harbored a third party posing a danger to them. Id. at A-20 to A-23. In the majority's opinion the fact that the respondent did not respond to the officers' inquiries about others inside the apartment was of little significance because his silence may have stemmed from a desire to invoke his Miranda rights. Id. at A-20 to A-21. In the majority's view, the police possessed no more than a "generalized possibility" that an unknown, armed person was lurking within the apartment. Id. at A-23.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CONNECTICUT SUPREME COURT AND THIS COURT AND THE FEDERAL CIRCUIT COURTS OF APPEAL CREATED BY THE CONNECTICUT SUPREME COURT'S CONCLUSION THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID SECOND TIER PROTECTIVE SWEEP, PARTICULARLY BECAUSE THE DECISION EXPOSES CONNECTICUT LAW ENFORCEMENT OFFICERS TO GREATER RISKS IN THE PERFORMANCE OF THEIR DUTIES THAN THOSE FACED BY THEIR COUNTERPARTS IN OTHER STATES

Here, the crack cocaine in the respondent's bedroom was properly admissible because it was discovered pursuant to a valid and permissible "protective sweep." A protective sweep is a quick and limited search of a premises, incident to a lawful arrest and conducted to protect the safety of police officers or others. It is narrowly limited in scope, confined to a cursory visual inspection of those places in which a person reasonably might hide.

Maryland v. Buie, supra, 494 U.S. 325, 110 S.Ct. 1093 (1990) is the seminal case which gave birth to the protective sweep doctrine. In Buie, this Court enunciated two levels of protective sweeps. On the first tier, as an incident to an arrest, the officers could as a precautionary matter and without probable cause or reasonable suspicion, look into closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Maryland v. Buie, 494 U.S. at

334. Thus, on the first tier, officers can undertake a cursory visual inspection of the adjacent area without any reasonable suspicion. Id. On the second tier, officers can search areas not adjacent to the place of arrest if there are articulable facts which taken together with rational inferences from these facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to the officers. Id. at 334-336.

### A. The Connecticut Supreme Court Applied A Subjective Standard Of Review In Direct Conflict With The Decisions Of This Court And The Federal Circuit Courts Of Appeal Which Uniformly Apply An Objective Standard

Here, the majority of the Connecticut Supreme Court applied the incorrect standard in arriving at the erroneous conclusion that the warrantless search did not constitute a valid second tier protective sweep.

This Court in Buie enunciated the standard to be used to evaluate second tier protective sweep claims: ". . . . we hold that there must be articulable facts, which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (Emphasis added.) Maryland v. Buie, 494 U.S. at 334. This Court further announced that such a protective sweep "may extend only to a cursory inspection of those places where a person may be found" and "lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." Id. at 335-336.

The application of the objective standard has long been settled in Fourth Amendment jurisprudence. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by . . . a valid exception to the warrant requirement." Horton v. California, 496 U.S. 128, 138, 110 S.Ct. 2301 (1990). See also, Maryland v. Macon, 472 U.S. 463, 470-471, 105 S.Ct. 2778 (1985); Scott v. United States, 436 U.S. 128, 138, 98 S.Ct. 1717 (1978); State v. James, 261 Conn. 395, 415, 802 A.2d 820 (2002).

Despite the guidance provided to it by this Court, the majority of the Connecticut Supreme Court ignored the basic jurisprudential principles enunciated in Buie and its progeny, including the Second Circuit Court of Appeals (see, e.g., United States v. Oguns, 921 F.2d 442 (2d Cir. 1990)), and applied a purely subjective standard in analyzing the second tier protective sweep claim. The majority clearly focused on the police officers' descriptions of their personal, subjective beliefs on that particular occasion, in arriving at the conclusion that these officers lacked any personal knowledge that any danger lurked in the area to be swept. See State v. Spencer, A-7 to A-9, A-20 to A-22. In making this determination the majority implicitly took the officers to task for using such terms as "standard procedure," "suspicion," and "possibility of surprise." See id. at A-20 to A-22.

The majority also factored in the officers' testimony showing that they did not personally know of the respondent before the surveillance of the building was undertaken, were personally unaware if he had any accomplices, were personally unaware if any persons at that address were armed or involved in

the drug trade, and were personally unaware that any person who posed a threat to them actually was inside the respondent's apartment at that time. Id. at A-21 to A-22. Based upon the officers' testimony, the majority concluded that the officers possessed only a "generalized possibility" that an unknown, armed individual might be lurking within the respondent's apartment, and that this did not amount to an articulable fact sufficient to justify a second tier protective sweep. Id. at A-22 to A-24.

The dissent accurately characterized that the majority's Fourth Amendment analysis as "fundamentally flawed." State v. Spencer, at A-38. The dissent recognized that first and foremost, the majority failed to apply the objective standard long required by established Fourth Amendment jurisprudence. Id. at A-27 to A-31. This objective standard is manifestly clear from the language of Buie, and this Court's reliance in Buie on Terry and Long.[1] The critical question, as this Court opined in Buie, is whether the requisite articulable facts and reasonable inferences "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (Emphasis added.) Maryland v. Buie, 494 U.S. at 334. As the dissent here correctly noted, the applicable standard "does not focus on the subjective beliefs of the particular officers, and how they might characterize them, such as a hunch, belief, suspicion, or other characterization." State v. Spencer, at A-29.

Moreover, as aptly noted by the dissent, application of the proper objective standard requires that the reviewing court employ both those reasonable inferences that the police officers

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[1] Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

on the scene may have in fact drawn, and those reasonable inferences that a reasonably prudent officer, standing in the shoes of the police officers on the scene, would be warranted in drawing, irrespective of whether those officers in fact drew or articulated them. Id. Here, by employing a purely subjective standard, the majority essentially ignored critical facts and those inferences rationally drawn therefrom, and thus reached a clearly erroneous result.

The ignored facts and accompanying inferences, are, variously, that: the intercepted parcel contained twenty-seven pounds of marijuana, permitting the reasonable inference of large-scale drug dealing at the address; the defendant freely accepted the package, despite the fact that no one named Sylvia Sloan resided at the address, permitting the reasonable inference that the defendant was the intended recipient and knew of the nature of the parcel's contents; the defendant's furtive conduct after delivery and the nature of the neighborhood buttresses this inference; the police knew that the defendant and his wife resided together at the address, and also knew from experience that large-scale drug operations employ other participants, and that these participants are often armed and disposed to violence, and the defendant refused to tell the police if someone else was inside, thus permitting the reasonable inference that someone else was inside the apartment at the time of arrest;[2] the police knew firearms were commonly associated with drug dealing operations; the apartment door, only twelve to fourteen steps distant, was ajar, permitting the reasonable inference that the officers were in a place that justified a fear for their safety from any accomplice inside the apartment; and, the trial court

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[2] See United States v. Brown, 217 F.3d 605, 607-608 (8th Cir. 2000) (fact that defendant paused before answering inquiry whether anyone was inside his residence constituted specific, articulable fact to support protective sweep).

specifically credited the officers' testimony that they entered that apartment only to search for weapons or other persons, in order to protect their safety, thus finding that the police in fact did have a subjective fear that a likely source of danger was located in the apartment. See State v. Spencer, at A-31 to A-35. This last finding, the dissent correctly noted, "is conclusive on the question of the purpose of the protective sweep involved." Id. at A-34. This is so because it is a fundamental principle of law that a reviewing court cannot reassess or retry the credibility of witnesses.

Had the majority considered these facts and inferences, the conclusion would have been inescapable "that there were 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent police officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.' Maryland v. Buie, supra, 494 U.S. 334. That is what Buie requires, and it is all that Buie requires." State v. Spencer, at A-35 (Borden, J., dissenting).

The majority in State v. Spencer clearly overstepped its bounds in applying Buie, by utilizing a subjective rather than the correct objective standard and by failing as a result to account for critical undisputed facts and the inferences rationally drawable therefrom. In so doing it has usurped this Court's role, having applied federal constitutional standards more broadly than applied by this Court, and has established a flawed precedent that conflicts with the decisions of all the federal Circuit Courts of Appeal,[3] and that will increase the danger that Connecticut police

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[3] Moreover, the Spencer decision has resulted in a conflict amongst the members of the Connecticut Supreme Court. On appeal, that Court ruled in favor of the respondent by a four to one margin. On the petitioner's subsequent motion for reargument or reconsideration en banc, that Court ruled

officers will face, without any corresponding vindication of suspects' Fourth Amendment rights.

### B. The Connecticut Supreme Court Has Improperly Expanded The Reach Of Miranda v. Arizona By Granting It Significance In The Fourth Amendment Protective Sweep Calculus, In Direct Conflict With The Decisions Of This Court And The Federal Circuit Courts Of Appeal

The trial court in the present case had determined that the warrantless search was justified, in part, because the respondent had not responded to officers' questions whether any other persons were inside the apartment. State v. Spencer, at A-21. In its decision, the majority of the Connecticut Supreme Court dismissed this fact as a factor in the Buie analysis, opining that the respondent's silence, standing alone, "is of minimal value," because the respondent already had been given notice of his constitutional rights under Miranda.[4] Id. at A-21. The majority concluded that the respondent's silence was not "sufficiently specific and articulable to support a reasonable belief that the [respondent's] apartment harbored a third party posing a danger to those on the arrest scene." Id. The majority reached this ultimate conclusion based upon its underlying determination that every post-arrest silence is "insolubly ambiguous," because the State is required to advise the arrestee that he has the right to remain silent, and that anything he does say may be used against him. Id.

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in favor of the respondent by a bare four to three margin.

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

The majority's reliance on the fact that the respondent had been advised of his Miranda rights before failing to answer questions about whether anyone else was inside the apartment is "simply irrelevant" to a Fourth Amendment analysis under Buie. As the dissent correctly noted, Miranda established a prophylactic exclusionary rule of evidence regarding the admissibility of confessions at trial, predicated upon the Fifth Amendment proscription against compelled self-incrimination. State v. Spencer, at A-39. There is no authority in the law for the proposition that Miranda informs the reasonableness of a protective sweep under the Fourth Amendment. State v. Spencer, at A-39 to A-40.

Regarding the majority's reliance upon the "insoluble ambiguity" of a post-arrestee's silence, this, too, is irrelevant for purposes of a Buie analysis. State v. Spencer, at A-40 to A-41. (Borden, J., dissenting). The ambiguity of an arrestee's silence relates only to a jury's ability at trial to draw an inference from the silence. See Doyle v. Ohio, 426 U.S. 610, 617-618, 96 S.Ct. 2240 (1976). Such post-arrest silence is not a factor in determining the reasonableness of a police officer's conduct. State v. Spencer, at A-40 to A-41. Something is deemed ambiguous where it may have more than one plausible meaning or explanation. Id. In the Fourth Amendment protective sweep context, this ambiguity cannot or should not prevent police officers from choosing the safest, most cautious, or most prudent meaning, and acting upon that choice for their safety and the safety of others. Id. To the extent that it can be said that Buie itself is "prophylactic" in general terms, i.e., it is a rule established by this Court to protect the safety of police officers in the legitimate performance of their duties, without a corresponding derogation or diminution of the arrestee's rights, the majority's decision here eviscerates that protection.

The majority's decision in the present case has

unilaterally and impermissibly blurred the lines of distinction between the Fourth and Fifth Amendments, and has created precedent that will have the bizarre result of barring police officers, who are required to give an arrestee his Miranda warnings, from then asking the arrestee, for their own safety and the safety fo the public, whether anyone else is inside his apartment. State v. Spencer, at A-39 to A-40. No other jurisdictions expose law enforcement officers to such increased danger. Such a result is abhorrent to sound public policy. Further, while imposing an odious and dangerous restriction on the officers, the majority's decision does nothing to further vindicate an arrestee's right to protection from unreasonable search and seizure. Nor does it provide further protection against compelled self-incrimination; it is already well established that his post-arrest silence cannot be used adversely at trial.

This Court has previously noted that the explicit textural protection contained within the Fifth Amendment self-incrimination clause supports a strong presumption against expanding the Miranda rule any further. United States v. Patane, __ U.S. __, 124 S.Ct. 2620, 2628, 159 L.Ed.2d 667, 677 (2004). This Court also has noted that the Miranda rule is not a code of police conduct. Patane, 124 S.Ct. at 2626, 159 L.Ed.2d at 675. This Court should grant certiorari as a first step to correcting the Connecticut Supreme Court's usurpation of this Court's role as arbiter of constitutional law. The Connecticut Supreme Court should not be permitted to expand federal constitutional protections beyond the parameters established by this Court, and should not be permitted to abrogate sound and well settled public policy.

### C. In Making Its Determination That The Warrantless Search Did Not Constitute A Valid Protective Sweep, The Connecticut Supreme Court Failed To Accord Due Deference To A Decision Of The Second Circuit Court Of Appeals That Is Directly On Point

On appeal to the Connecticut Supreme Court, the prosecution posited that United States v. Oguns, supra, 921 F.2d 442 (2d Cir. 1990), was directly on point and compelled the conclusion that the warrantless search in the present case was justifiable as a valid Buie second tier protective sweep. The majority of the state court disagreed and declined to apply the reasoning of Oguns to the present case, despite its express acknowledgment that Oguns "is factually similar." State v. Spencer, at A-24 to A-25. The dissent concluded that Oguns was so similar to the present case that it was controlling and dispositive of the second tier protective sweep question. State v. Spencer, at A-35 to A-38.

In Oguns, a Nigerian national named Saka Adenrele arrived at Kennedy International Airport from Nigeria carrying 1405 grams of heroin in his underwear. Id., 921 F.2d at 444-445. Federal customs agents apprehended Adenrele. Id. Adenrele told the agents that the heroin was to be delivered to the defendant or the defendant's brother and roommate Timo. Id. Adenrele agreed to cooperate with the agents, and the agents arranged a controlled delivery wherein Adenrele would bring the drugs to the defendant at the defendant's apartment. Id.

In a telephone conversation the defendant told Adenrele that he had no money, but that Timo would have the money when he returned the next day, and the defendant suggested that Adenrele come to the apartment and spend the night there. Id. at

444. In a second telephone conversation about thirty minutes later, the defendant told Adenrele that he would be waiting for him outside his apartment and would be wearing a pair of shorts. Id. at 445.

The agents gave Adenrele a tote bag containing some of the heroin. Id. A masquerading agent drove Adenrele to the defendant's apartment in a taxicab. Id. at 444-445. The defendant was sitting on the front steps of a two-family building. Id. The defendant walked to the taxicab and paid the fare, and then he and Adenrele walked toward the building. Id. at 445. At this juncture the agents arrested the defendant. Id. One agent, noticing an open apartment door abutting the hallway inside the building, asked the defendant if it was the door to his apartment. Id. When the defendant admitted that it was, the agents effected a protective sweep of the defendant's apartment. Id.

The defendant, as a predicate for his challenge to a subsequent consensual search of his apartment, challenged the legality of the protective sweep. Id. The United States Court of Appeals for the Second Circuit rejected the challenge. The Court of Appeals stated: "Applying [Buie] to the agent's security sweep of the [defendant's] apartment, we conclude that the agents' actions did not violate [the defendant's] Fourth Amendment rights. The agents arrested [the defendant] at twilight just outside of a two family house. When the agents entered the lobby of the building, they noticed that the door to the [defendant's] apartment was open. Even though the agents had been told that [the defendant's] brother was not in the apartment, they still could have reasonably believed that others were in the apartment. The agents also could have reasonably believed that people in the apartment saw or heard them arrest [the defendant] and might jeopardize the agents' safety or destroy relevant evidence. Had third parties been in the apartment, they would likely have been able to hear through the

open door the agents arresting [the defendant] and, with that knowledge, would have posed a threat to the police outside. In view of the circumstances confronting the officers and the fact that the [D]istrict [C]ourt's factual findings were not clearly erroneous, we hold that the security sweep met the Fourth Amendment requirements specified in Buie . . .." United States v. Oguns, 921 F.2d at 446-447.

The majority of the Connecticut Supreme Court attempted to distinguish the present case from Oguns, relying on the facts that in Oguns, (1) the agents knew the defendant was involved in the drug trade with at least three other people: his brother Timo, Adenrele, and a woman in Nigeria; (2) that the defendant was expecting the delivery of heroin; and (3) that although the defendant had told Adenrele that Timo was not at home, the federal officers "nonetheless reasonably could have believed that an accomplice was inside the apartment at the time of the defendant's arrest." State v. Spencer, at A-24 to A-25. The majority thereupon concluded that "[i]n the absence of any such similar knowledge, we decline to apply the reason of Oguns to the present case." State v. Spencer, at A-25.

The dissent concluded that Oguns was absolutely on point with the present case and compelled the conclusion that the warrantless search here was a justifiable, legitimate second tier Buie protective sweep. State v. Spencer, at A-35 to A-38. The dissent opined that in fact there were no features in Oguns to distinguish it from the present case. State v. Spencer, at A-37. In support of this conclusion, the dissent noted that the cases were identical in all significant points: in both cases "(1) a large amount of illegal drugs were destined for the defendant at his address; (2) there was no certainty that anyone else was in the apartment - indeed, in Oguns, unlike the present case, there was specific evidence that the only other known inhabitant was not therein; (3) there was no specific evidence that whoever might be

in the apartment would be armed; and (4) the defendants were arrested outside the apartment, and the door to the apartment was ajar, indicating that anyone inside would know of the arrest." State v. Spencer, at A-37.

The dissent determined, based on the factual similarities, "in both cases the police officers reasonably could have believed that others were in the apartment who (1) would be likely to know of their accomplice's arrest, and (2) would pose a danger to the arresting officers; and in both cases, therefore, the requirements of Buie were met." State v. Spencer, at A-37 (see cases cited therein). The dissent also noted that the majority in the present case had failed to give the opinions of the Court of Appeals for the Second Circuit the "significant deference" that such persuasive authority was so entitled. Id. at A-37 to A-38. Oguns is undeniably within the category of decisions entitled to great weight, "particularly because the present case is resolved on the basis of the federal constitution." State v. Spencer, at A-38.

Here, the majority failed to apply the reasoning of Oguns to the present case based upon artificial and unconvincing distinctions, and failed to give the Second Circuit Court of Appeals the deference it deserved on a federal constitutional question. The decision of the Connecticut Supreme Court is in direct conflict with the decisions of the Second Circuit, and this Court should grant certiorari to resolve the conflict.

## II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CONNECTICUT SUPREME COURT AND THE FEDERAL CIRCUIT COURTS OF APPEAL CREATED BY THE CONNECTICUT SUPREME COURT'S CONCLUSION THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID FIRST TIER PROTECTIVE SWEEP

Here, the unanimous Connecticut Supreme Court incorrectly concluded that the police officers' warrantless intrusion into the respondent's apartment did not qualify as a permissible first tier Buie protective sweep. From the front hallway the officers plainly observed that the respondent's apartment was at the top of a short stairway. Thus, the partially open door to the respondent's apartment loomed over the officers' heads with Damocletian ominousness, as it was perhaps only ten to twelve feet away in vertical distance and perhaps only six feet away in horizontal distance. It reasonably represented the threat of sudden and unexpected attack from above. Any conclusion to the contrary conflicts with the decisions of several federal Circuit Courts of Appeal, including the Second Circuit. These federal courts have held that for purposes of first tier Buie analysis, the beckoning door cannot reasonably be deemed anything but "immediately adjoining" the arrest site. See In Re Sealed Case 96-3167, 153 F.3d 759 (D.C. Cir. 1998) (suspect arrested in large second floor bedroom and brought to bottom of stairs on first floor and there secured; officers returned upstairs and executed protective sweep of smaller bedroom at top of stairs; sweep justified because attack could be immediately launched from bedroom onto police officers below at foot of stairs); Ortiz-Sandoval v. Gomez, 81 F.3d 891 (9th Cir. 1996) (suspect arrested in garage apartment; attic space above suspect's bed constituted area immediately adjoining arrest site from

which attack could be launched on officers below). United States v. Lauter, 57 F.3d 212, 216-217 (2d Cir. 1995) (rear room of two room apartment was, in Buie first tier protective sweep analysis, immediately adjoining front room where defendant was arrested); United States v. Robinson, 775 F.Supp. 231, 232-235 (N.D. Ill. 1991) (arrest of defendant in mouth of interior hallway of apartment building that connected pool room with other apartments; protective sweep of defendant's locked bedroom was permissible because it constituted adjacent space from which an attack could be mounted). Moreover, as Robinson demonstrates, our courts will countenance first level Buie protective sweeps when, as here, an arrest is made outside the home, on the theory that the police officers are as much at risk from an unexpected assault on the suspect's doorstep as they might be inside the home. The Connecticut Supreme Court clearly erred in concluding that this search did not qualify as a first tier protective sweep. Its disregard of the spatial peculiarities of the particular geography, and its unbalanced assessment of the competing interests has resulted in a ruling that will expose Connecticut police officers to even more peril than they currently are exposed to daily in the search and seizure context. Connecticut law enforcement officers should be entitled to the same protections afforded officers in other jurisdictions. The conflict created by Spencer at the first tier level should be reviewed and reconciled by this Court.

## CONCLUSION

The State of Connecticut respectfully asks this Court to grant certiorari to correct the error of the Connecticut Supreme Court, to resolve the differences between the federal circuits and the Connecticut Supreme Court, and to clarify this crucial area of Constitutional law, which has a significant impact on the safety of police officers in the performance of their duties.

Respectfully submitted,

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August, 2004

No. _____

In The

# Supreme Court Of The United States

STATE OF CONNECTICUT,

*Petitioner,*

v.

MICHAEL SPENCER,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## APPENDIX

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STATE OF CONNECTICUT V. MICHAEL SPENCER
(SC 17045)

Sullivan, C.J., and Borden, Katz, Vertefeuille and Zarella, Js.

*Syllabus*

Convicted of the crime of possession of narcotics, the defendant appealed, claiming that the warrantless search of his apartment by the police during which they observed in plain view in his bedroom some crack cocaine violated his constitutional rights to be free from unreasonable searches and seizures. The police went to the defendant's residence after they had been informed by a sheriff's office in Tennessee that it had intercepted a Federal Express parcel containing twenty-seven pounds of marijuana that was addressed to an individual at the defendant's residence. After taking possession of the parcel, the Stamford police department confirmed that it contained marijuana and the police subsequently conducted a controlled delivery of the parcel to the defendant's address, using a police officer dressed as a Federal Express employee to make the delivery. The officer approached the multifamily house, rang the doorbell for the first floor apartment and knocked on the front door. The defendant opened the door, and after identifying himself and indicating that he lived on the second floor, stated that he would accept the package. He signed the delivery invoice, took possession of the parcel and went inside and closed the door. As the officer who made the delivery walked away, the defendant came back outside without the package, at which time he was approached by four police officers in the front doorway of the residence. The police brought the defendant into the first floor common hallway, where they observed the parcel on a shelf, and arrested him. From the bottom of the stairway that led to the defendant's second floor apartment, the police noticed that the doorway to his apartment

was ajar. The police asked the defendant if anyone else was in the apartment but he did not respond. Two officers then ascended the stairs and entered the defendant's apartment, where they observed the narcotics in plain view on the defendant's bed. At trial, the defendant filed a motion to suppress the evidence seized from his apartment on the ground that it had been obtained illegally as a result of a warrantless search without exigent circumstances in violation of the state and federal constitutions. The state argued that the warrantless search was justified because the defendant had accepted a substantial amount of marijuana and would not respond to police inquiries regarding the presence of anyone else in his apartment, thereby allowing for a protective search of the premises for the safety of the police and to prevent the destruction of evidence. The trial court, relying on *Maryland v. Buie* (494 U.S. 325), denied the defendant's motion to suppress, concluding that the warrantless search of the defendant's apartment was supported by "a reasonable belief based on specific and articulable facts that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." The jury returned a verdict of guilty of possession of narcotics and the trial court rendered judgment in accordance with the verdict, from which the defendant appealed. *Held*:

1. The defendant could not prevail on his claim that the rule of *Buie* was intended for circumstances wherein a person has been arrested inside his home pursuant to an arrest warrant and, therefore, was inapplicable here because he was arrested outside his apartment; this court could not conclude that *Buie* was intended to preclude the police from conducting an otherwise reasonable protective search of a home simply because an arrest occurred just outside the home or without an arrest warrant.

2. The trial court improperly denied the defendant's motion to suppress the evidence seized from his apartment, the warrantless search of the apartment, under all the facts and the reasonable inferences drawn therefrom, not having been justified as a

protective sweep under the rule of *Buie*; the generalized possibility that an unknown, armed person may be lurking nearby is not an articulable fact sufficient to justify a protective sweep, and the police here were unaware of whether the defendant had any accomplices, the police investigation revealed no persons living at the address who may have been armed or involved in the sale of drugs, and the police had no information that any person who posed a threat to them or to others may have been at the defendant's apartment at that time.

*(One justice dissenting)*

Argued January 9–officially released April 27, 2004

*Procedural History*

Information charging the defendant with the crimes of possession of marijuana with intent to sell and possession of narcotics, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, where the court, *Hickey, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury before *Hickey, J.*; verdict and judgment of guilty of possession of narcotics, from which the defendant appealed. *Reversed; further proceedings.*

*Howard Ehring*, senior assistant public defender, for the appellant (defendant).

*John A. East III*, senior assistant state's attorney, with whom, on the brief, were *David I. Cohen*, state's attorney, and *Mitchell Rubin*, senior assistant state's attorney, for the appellee (state).

*Opinion*

KATZ, J. The defendant, Michael Spencer, appeals[1] from the judgment of conviction, following a jury trial, of possession of a narcotic substance in violation of General Statutes § 21a-279 (a).[2] The sole issue on appeal is whether the warrantless search of the defendant's apartment violated his constitutional right to be free from unreasonable searches and seizures under the fourth amendment to the United States constitution[3] and article first, § 7, of the Connecticut constitution.[4] We conclude that the search violated the

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[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2]General Statutes § 21a-279 (a) provides: "Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

[3] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourth amendment is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[4]Article first, § 7, of the constitution of Connecticut provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as

defendant's rights under the federal constitution and, accordingly, we reverse the judgment of the trial court.[5]

The record reveals the following facts and procedural history. On April 12, 2000, the sheriff's office of Shelby County, Tennessee notified the Stamford police department that it had intercepted a Federal Express parcel containing approximately twenty-seven pounds of marijuana, and that the parcel was addressed to a "Sylvia Sloan"[6] at 16 Lipton Place in Stamford. On the basis of this information, the Stamford police surveilled the designated residence and observed that it appeared to be a multifamily house.[7] Police department records revealed that in February, 2000, officers had responded to a call at that address concerning a domestic disturbance involving the defendant and his wife.

The following morning, the police took possession of the parcel from the Stamford Federal Express office, and a field test

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may be, nor without probable cause supported by oath or affirmation."

[5]The defendant claims that he is entitled to greater protection from unreasonable search and seizure under the Connecticut constitution than under the federal constitution. See *State v. Geisler*, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992). Because we conclude that the warrantless search of the defendant's apartment was unreasonable under the federal constitution, we need not decide whether the state constitution affords greater protection under the specific facts of the present case.

[6]At trial, various witnesses referred to the name on the parcel as "Sylvia Sloan," "Sylva Sloan," or "Sylvan Sloan."

[7]The police officers later learned, subsequent to the arrest of the defendant, that the house contained three apartments and was owned by an elderly woman who occupied the first floor apartment. The officers also learned that the defendant and his wife occupied the second floor apartment and an elderly man lived by himself in the third floor apartment.

revealed that its contents were, in fact, marijuana. They then replaced approximately five pounds of the marijuana in the box and resealed it for delivery. Later that morning, working with the statewide narcotics task force, the police conducted a "controlled delivery" of the parcel to 16 Lipton Place. Police officers surveilled the residence from vantage points approximately fifty to sixty feet away while a task force member, Detective Frederick Caruso, delivered the parcel. Caruso, dressed in a Federal Express coat and carrying the parcel and a pad of delivery invoices, rang the doorbell for the first floor apartment and knocked on the front door. The defendant opened the door. In response to Caruso's questions, the defendant verified the address and told him that his name was Michael Spencer and that he lived on the second floor. When Caruso told him that the delivery was for "Sylvia Sloan" the defendant repeated the name to himself, and then told Caruso that he would accept the package. The defendant signed the delivery invoice, took possession of the parcel and went inside and closed the front door. As Caruso walked away, the defendant came back outside, without the parcel, and looked up and down the street.

At this point, police sergeant Eugene Dohmann, and police officers Larry Eisenstein, Douglas Robinson and Wayne Scutari, approached the residence and encountered the defendant in the front doorway. They identified themselves as police officers and brought the defendant into the first floor common hallway, where they observed that the Federal Express parcel had been placed on a shelf. The officers then read the defendant his *Miranda*[8] rights and placed him under arrest. The defendant denied knowledge of the contents of the parcel or of anybody named Sylvia Sloan, and he claimed that he innocently had

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[8]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

accepted the package.

From the bottom of a stairway of approximately twelve to fourteen steps leading up to the second floor, the officers could see that the door to the defendant's apartment was ajar. Eisenstein asked the defendant if anybody else was inside the apartment, and received no response. Eisenstein and Robinson subsequently ascended the stairs and entered the defendant's apartment. In the defendant's bedroom, they observed, in plain view on top of the defendant's bed, a homemade "crack" pipe and a dinner plate containing crack cocaine residue, as well as a rolled up $1 bill containing crack cocaine.

The defendant subsequently was charged with possession of one kilogram or more of a cannabis-type substance with intent to sell in violation of General Statutes § 21a-278 (b),[9] and possession of narcotics in violation of § 21a-279 (a). See footnote 2 of this opinion. At trial, the defendant filed a motion to suppress the evidence of crack cocaine seized from his apartment on the ground that the evidence had been obtained

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[9] General Statutes § 21a-278 (b) provides in relevant part: "Any person who . . . possesses with the intent to sell or dispense . . . one kilogram or more of a cannabis-type substance except as authorized in this chapter, and who is not at the time of such action a drug-dependent person, for a first offense shall be imprisoned not less than five years nor more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years nor more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired but not so impaired as to constitute a defense to prosecution."

illegally as the result of an unconstitutional warrantless search.[10] The trial court conducted a full evidentiary hearing on the motion to suppress, during which Dohmann, Eisenstein, Robinson and Scutari testified for the state.

Dohmann testified that the defendant was "kind of reluctant" to tell the officers whether anybody else was in his apartment. According to Dohmann, the defendant "was a bit nervous," and the officers feared that he may have been "hiding something" from them. Therefore, the officers decided to enter the apartment "to make sure no further evidence was being destroyed or possibly other people involved that may [be] escaping." They also were concerned for their safety. Dohmann explained that weapons often are involved "in that type of business . . . to prevent being detained or being arrested," and that "it's not unusual for narcotics and weapons to be found in the same building and we wanted to make sure there [were] no weapons and more importantly nobody up there to use those weapons." He further testified: "I didn't think it was just a coincidence that this package was being delivered there. So, it was our belief that there was somebody in that apartment and we didn't really expect the package to come back to the name on the package [because] it's not typically done that way for obvious reasons. So, we expected somebody was in that apartment that was expecting a large amount of marijuana and with that we're feeling there's a drug dealer in that apartment. And, if there's a drug dealer in that apartment, we don't know who he is and he could very well be armed." In addition, Dohmann testified that he had, in "many" situations involving arrests outside of apartments, entered those apartments without warrants to search

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[10]It was undisputed that the officers' entry into the defendant's apartment constituted a warrantless search for purposes of the fourth amendment analysis.

for weapons or to prevent destruction of evidence. According to Dohmann, this practice was "standard procedure" because "[t]he safety of the officers is paramount and there's times when you just can't wait. You have to do what you have to do."

On cross-examination, Dohmann acknowledged that the investigation prior to the controlled delivery had not revealed that anybody named Sloan was living at 16 Lipton Place. He also acknowledged that his investigation had not revealed any indication that any individual living at that address might be armed or involved in the drug trade. Finally, defense counsel questioned Dohmann concerning the officers' decision to enter the defendant's apartment:

"Q. There came a time when you went up the stairs to go into [the defendant's] home--

"A. Uh-huh.

"Q.--and again, you had a suspicion that there were--you had a suspicion that there could be somebody armed upstairs?

"A. A suspicion? I wouldn't say a suspicion but we had to know.

"Q. A hunch?

"A. Our suspic--not a hunch. Just, you don't even think about it. You just have to eliminate--we have to eliminate the possibility so we went up there with the possibility of that being there and we didn't want to be surprised."

Eisenstein testified that he had observed that the defendant's door was approximately six inches ajar. He asked the defendant "several times" whether anybody was in the apartment, and received no response. Therefore, he and Robinson performed

a "protective search" of the defendant's apartment. According to Eisenstein, they did not look in any drawers, and their search was limited to places "where you might find people, human beings." Finally, he testified that he had performed protective sweeps "on numerous occasions under similar circumstances." On cross-examination, Eisenstein acknowledged that the investigation leading up to the controlled delivery of the package had not indicated that there were any armed and dangerous people living at 16 Lipton Place. He also stated that, at that time, he had not been aware of anybody in the "immediate area" of that residence who might have been "that magnitude of a marijuana dealer." In addition, Eisenstein stated: "I felt that . . . the only apartment under question here was the second floor apartment belonging to [the defendant] and that the other apartments didn't really come into play in the investigation. And, it appeared from . . . the house, there was no other noise. Nobody came out of their doors to see what was going on or anything else. So, my assumption was that he was the only one at home at that time."

Finally, Robinson testified for the state that he personally had conducted "hundreds" of protective sweeps, and "numerous" protective sweeps in situations wherein an individual had been arrested outside of an apartment. Scutari testified that the area surrounding 16 Lipton Place was known for a high level of drug activity.

In oral argument before the trial court on the defendant's motion to suppress, the state argued that the warrantless search was justified because the defendant had accepted a substantial amount of marijuana, the door to his apartment was ajar and he would not answer the officers' questions concerning whether anybody else was in his apartment. According to the state, "the law allows for [a protective sweep] . . . where you have a quick sequence of events and the officers are concerned for their safety and they want to prevent [the destruction of] evidence . . . ."

The defendant argued, in response, that the evidence should be suppressed because it had been obtained via a warrantless search without exigent circumstances, in violation of both the federal and state constitutions. The defendant recognized *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), wherein the United States Supreme Court held that a protective sweep of an arrestee's home may be constitutional in some situations, but he argued that *Buie* was distinguishable because the officers in that case had been armed with an arrest warrant, and they had a reasonable and articulable suspicion that an armed accomplice may have been hiding in the arrestee's house. The defendant indicated that neither of these elements was fulfilled in the present case and, therefore, *Buie* did not apply.

The trial court, relying on *Buie*, denied the defendant's motion to suppress. In a written articulation, the court stated the factual grounds underlying its decision: "[Sergeant] Dohmann of the Stamford police [department] said that the defendant . . . was questioned and asked, who was in there and didn't answer. Police officers decided to go in for the purpose to search for weapons or people in the attic--the apartment, safety of officers paramount. . . . Officer Eisenstein said that he participated in a protective search of the property, which was a limited search, which he had done many times before. He and Officer Robinson did a protective sweep. Officer Robinson stated that he had participated in protective sweeps hundreds of times before." The trial court thereafter admitted into evidence the narcotics and drug paraphernalia seized from the defendant's apartment. The jury returned a verdict finding the defendant not guilty of possession with intent to sell of one kilogram or more of a cannabis-type substance, and guilty of possession of narcotics. This appeal followed.

"Our standard of review of a trial court's findings and

conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State v. Betances*, 265 Conn. 493, 500, 828 A.2d 1248 (2003). In the present case, the trial court, citing *Buie*, determined, as a matter of law, that the warrantless search of the defendant's apartment was supported by "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Therefore, our review is plenary.

"It is a basic principle of constitutional law that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions. . . . The fourth amendment's requirement that a warrant issue from a neutral and detached judicial officer rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . [H]owever, the fourth amendment proscribes only unreasonable searches and seizures, and there will be occasions when, given probable cause to search, resort to the judicial process will not be required of law enforcement officers. Thus, where exigent circumstances exist that make the procurement of a search warrant unreasonable in light of the dangers involved . . . a warrant will not be required. . . . *State v. Januszewski*, 182 Conn. 142, 151-52, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981); see *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) (possible harm to police officer constitutes reasonable

cause for warrantless search).

"Our past cases indicate . . . that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger . . . and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that [a warrantless search], limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. See *Terry* [*v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)]. [T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Id., [27]. . . . If, while conducting a legitimate *Terry* search . . . the officer should, as here, discover . . . weapons, he clearly cannot be required to ignore the [weapons], and the Fourth Amendment does not require [their] suppression in such circumstances. . . . *Michigan v. Long*, 463 U.S. 1032, 1049-50, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)." (Internal quotation marks omitted.) *State v. Vega*, 259 Conn. 374, 400-401, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

In *Maryland v. Buie*, supra, 494 U.S. 327, the United States Supreme Court addressed the "level of justification . . . required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises." In *Buie*, an arrest warrant had been issued for the defendant and his suspected accomplice following an armed robbery that had been committed

by two men. Id., 328. When the police went to the defendant's house to execute the warrant, the defendant was in the basement. He emerged from the basement peacefully, and the police arrested him. Id. One of the officers then entered the basement to determine whether anybody else was there and he observed certain incriminating evidence in plain view. Id.

The trial court denied the defendant's motion to suppress, and he was convicted of the crimes charged. The Maryland Court of Appeals reversed the judgment of conviction, concluding that a protective sweep must be supported by "probable cause to believe that a serious and demonstrable potentiality for danger exists." (Internal quotation marks omitted.) *Buie v. State*, 314 Md. 151, 159-60, 550 A.2d 79 (1988). The Court of Appeals further concluded that the state had not satisfied that probable cause requirement. Id., 165-66.

Following its grant of the state's petition for a writ of certiorari; *Maryland v. Buie*, 490 U.S. 1097, 109 S. Ct. 2447, 104 L. Ed. 2d 1001 (1989); the United States Supreme Court vacated the judgment, concluding that the probable cause requirement imposed by the Maryland Court of Appeals was "an unnecessarily strict Fourth Amendment standard," and remanded the case for further proceedings. *Maryland v. Buie*, supra, 494 U.S. 337. Drawing upon its earlier decisions in *Terry* and *Long*, which had authorized limited frisks for weapons in the interest of officer safety, the court recognized "an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." Id., 333. The court further explained: "The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of

arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." Id.

Recognizing the often competing interests of the individual's expectation of privacy and the officers' safety, the court therefore determined that there were two levels of protective sweeps. Concerning the first tier of protective sweeps, the court concluded that "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Id., 334. Concerning the second tier of protective sweeps, the court concluded: "Beyond that . . . we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. The court further emphasized that a protective sweep "may extend only to a cursory inspection of those spaces where a person may be found"; id., 335; and "lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." Id., 335-36. Guided by the principles enunciated in *Buie*, we now turn to the merits of the defendant's claim in the present case.

The defendant first contends that *Buie* is inapplicable to the present case because the rule of *Buie* was "intended" for circumstances wherein a person has been arrested inside his home, pursuant to an arrest warrant. Essentially, the defendant

urges us to adopt a per se rule that protective sweeps are unreasonable when, as here, they are incident to a *warrantless* arrest conducted *outside* of the arrestee's home.

Although the United States Supreme Court never has ruled on the constitutionality of a protective sweep of a home, incident to an arrest occurring just outside that home, the federal courts that have addressed the issue uniformly have held that the reasoning of *Buie* applies to that situation. See, e.g., *United States v. Cavely*, 318 F.3d 987, 995 (10th Cir.), cert. denied, U.S. , 123 S. Ct. 2653, 156 L. Ed. 2d 659 (2003); *United States v. Wilson*, 306 F.3d 231, 238 (5th Cir. 2002), cert. denied, 537 U.S. 1240, 123 S. Ct. 1371, 155 L. Ed. 2d 211 (2003); *Sharrar v. Felsing*, 128 F.3d 810, 823-24 (3d Cir. 1997); *United States v. Colbert*, 76 F.3d 773, 776-77 (6th Cir. 1996); *United States v. Henry*, 48 F.3d 1282, 1284 (D.C. Cir. 1995); *United States v. Oguns*, 921 F.2d 442, 446-47 (2d Cir. 1990); see also *United States v. Kimmons*, 965 F.2d 1001, 1004, 1009-10 (11th Cir. 1992), cert. denied, 506 U.S. 1086, 113 S. Ct. 1065, 122 L. Ed. 2d 370 (1993), cert. granted and judgment vacated on other grounds, *Small v. United States*, 508 U.S. 902, 113 S. Ct. 2326, 124 L. Ed. 2d 239 (1993), judgment reinstated, *United States v. Kimmons*, 1 F.3d 1144 (11th Cir. 1993).

In *United States v. Henry*, supra, 48 F.3d 1284, the United States Court of Appeals for the District of Columbia Circuit explained: "Although *Buie* concerned an arrest made in the home, the principles enunciated by the [United States] Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence. . . . That the police arrested the defendant outside rather than inside his dwelling is relevant to the question of whether they could reasonably fear an attack by someone within it. The officers' exact location, however, does not change the nature of the appropriate inquiry: Did articulable facts exist that would lead a reasonably prudent officer to believe

a sweep was required to protect the safety of those on the arrest scene?" (Citations omitted.) Furthermore, we recognize that *Buie* was grounded in the principle that arresting officers have an immediate interest "in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." *Maryland v. Buie*, supra, 494 U.S. 333. This important safety interest is not diminished simply because the arrest has occurred just outside of the home. See *United States v. Colbert*, supra, 76 F.3d 776 ("in some circumstances, an arrest taking place just outside a home may pose an equally serious threat to the arresting officers").

Moreover, although the arrest in *Buie* was effectuated pursuant to an arrest warrant, the United States Supreme Court did not base its decision upon this fact. Indeed, the interest of police officers in protecting their own safety, and the safety of others, is certainly no less when they arrest a suspect without an arrest warrant. We are aware of no court that has concluded that a protective sweep was unreasonable simply because the accompanying arrest had been effectuated without an arrest warrant. Indeed, some courts expressly have upheld a protective sweep as reasonable under such circumstances. See *United States v. Jones*, 193 F.3d 948, 949-50 (8th Cir. 1999) (police chased fleeing defendant into apartment building and arrested him without arrest warrant; protective sweep of building reasonable); *United States v. Kimmons*, supra, 965 F.2d 1008-1009 (protective sweep of arrestee's home reasonable after warrantless arrest just outside of home). We do not believe that *Buie* was intended to preclude the police from conducting an otherwise reasonable protective search of a home simply because an arrest has occurred just outside the home or without an arrest warrant. Therefore, we disagree with the defendant's claim that the boundaries of *Buie* are so narrowly defined and, accordingly, we decline to adopt such a limited bright-line rule.

The defendant next claims that the warrantless search of his apartment cannot be justified as either a first tier or second tier protective sweep under *Buie*. The state contends, in response, that the search constituted a permissible protective sweep under either prong of the *Buie* analysis. We agree with the defendant.

Within the first tier of protective sweeps, arresting officers can, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces *immediately adjoining* the place of arrest from which an attack could be immediately launched." (Emphasis added.) *Maryland v. Buie*, supra, 494 U.S. 334. In the present case, the defendant was arrested in a first floor common hallway at the bottom of a stairway of approximately twelve to fourteen steps leading up to his second floor apartment. Therefore, the defendant's apartment cannot be characterized as a space "immediately adjoining" the place of the arrest. The state nevertheless contends that the search was justifiable as a first tier protective sweep because "the defendant's apartment was at the top of a short stairway, probably only eight to ten feet away and clearly analogous to the stairway leading down into the basement in *Buie*." This comparison to *Buie* is of little moment, however, because the search in that case was not upheld as a valid first tier protective sweep. Rather, the United States Supreme Court remanded the case to the Maryland Court of Appeals for a determination of whether the search could be justified as a second tier protective sweep--that is, whether "the searching officer possesse[d] a reasonable belief based on specific and articulable facts that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, supra, 337; see also id. (Stevens, J., concurring) (on remand, "it is the State's burden to demonstrate that the officers had a reasonable basis for believing" that third party in basement might attack them or otherwise interfere with

arrest).[11] We therefore must determine whether the search in the present case was justifiable as a second tier protective sweep.[12] See *Sharrar v. Felsing*, supra, 128 F.3d 824 ("a sweep incident to an arrest occurring just outside the home must be analyzed under the second prong of the *Buie* analysis").

The second tier of protective sweeps under *Buie* encompasses searches of areas beyond those spaces immediately adjoining the place of arrest. To satisfy the fourth amendment, a second tier protective sweep must be supported by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in

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[11]On remand, the Maryland Court of Appeals concluded that the protective sweep was proper under the "reasonable suspicion," or second tier, standard. *Buie v. State*, 320 Md. 696, 706, 580 A.2d 167 (1990), cert. denied, 498 U.S. 1106, 111 S. Ct. 1011, 112 L. Ed. 2d 1094 (1991).

[12]The state further contends that "[c]ourts will countenance first level *Buie* protective sweeps when, as here, an arrest is made outside the home, on the theory that the police officers are as much at risk from an unexpected assault on the defendant's doorstep as they might be inside the home." Two of the four cases that the state cites on this point, however, were decided before *Buie* and, therefore, did not distinguish, analytically, between a first tier and second tier protective sweep. See *United States v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989), cert. denied, 498 U.S. 825, 111 S. Ct. 80, 112 L. Ed. 2d 52 (1990), overruled on other grounds, *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001); *United States v. Sheikh*, 654 F.2d 1057, 1071 (5th Cir. 1981), cert. denied, 455 U.S. 991, 102 S. Ct. 1617, 71 L. Ed. 2d 852 (1982), overruled on other grounds, *United States v. Zuniga-Salinas*, 952 F.2d 876 (5th Cir. 1992). The two other cases that the state cites were resolved under the second prong of *Buie*. See *United States v. Oguns*, supra, 921 F.2d 446-47 (upholding protective sweep under *Buie* when searching agents "could have reasonably believed" that third parties were in apartment and might jeopardize agents' safety or destroy evidence); *United States v. Delgado*, 903 F.2d 1495, 1502 (11th Cir. 1990) (protective sweep valid under *Buie* because police had "very good reason to believe" that more suspects were hiding in warehouse), cert. denied, 498 U.S. 1028, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991).

believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, supra, 494 U.S. 334. In this case, because the defendant was in custody, the focus of our inquiry is "whether the arresting officers reasonably believed that *someone else inside the* [*home*] might pose a danger to them." (Emphasis in original.) *United States v. Colbert*, supra, 76 F.3d 777; see also *Sharrar v. Felsing*, supra, 128 F.3d 825 (possible presence of third party in arrestee's home is "touchstone" of protective sweep analysis). In other words, we examine whether there were "specific and articulable facts showing that another individual, who posed a danger to the officers or others," was inside the apartment at the time of the arrest. *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir.), cert. denied, 528 U.S. 1048, 120 S. Ct. 585, 145 L. Ed. 2d 486 (1999); see also *Sharrar v. Felsing*, supra, 824 ("[i]f the search goes beyond the immediate adjoining areas, there must be 'articulable facts' which would warrant a reasonably prudent officer to believe that there are individuals who pose a danger in other areas of the house").[13] "Lack of information [concerning the presence of a third party] cannot provide an articulable basis upon which to justify a protective sweep." *United States v. Colbert*, supra, 778.

The trial court in the present case determined that a warrantless search was justified because the defendant had not responded to the officers' questions concerning whether anybody else was in his apartment, and also because the officers had conducted "numerous" or "hundreds" of protective sweeps on

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[13]The fact that the defendant's wife lived with him is insufficient to establish that "*someone of danger* to the [police] was in the house at that time." (Emphasis added.) *United States v. Akrawi*, 920 F.2d 418, 419 (6th Cir. 1990); id., 419-20 (mere presence of accomplice's mother and possible presence of defendant's girlfriend insufficient to establish reasonable belief that dangerous persons were on premises).

prior occasions. Neither of these facts is sufficiently specific and articulable to support a reasonable belief that the defendant's apartment harbored a third party posing a danger to those on the arrest scene. The defendant's failure to respond to the officers' questions may have stemmed from a desire to invoke his *Miranda* rights. "The *Miranda* tenets 'require that a person taken into custody be advised immediately that he has the right to remain silent, [and] that anything he says may be used against him . . . . Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.'" *State v. Canty*, 223 Conn. 703, 710, 613 A.2d 1287 (1992), quoting *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Therefore, the defendant's silence, standing alone, is of minimal value to our inquiry. Cf. *United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991) (arrestee had been seen in presence of murder suspect, opened door with gun *and* failed to answer officers' questions concerning other people in house; "in our opinion, the officers would have been entitled to sweep the house even if [the arrestee] said that no one else was home"). Furthermore, the fact that the officers had conducted numerous protective sweeps on prior occasions as a matter of "standard procedure" provides no basis to support a reasonable belief that a protective sweep was necessary on *this* particular occasion. See *United States v. Brown*, 69 F. Sup. 2d 925, 931 (E.D. Mich. 1999) (protective sweep conducted "as a matter of course" unreasonable under *Buie*); *State v. Estep*, 753 N.E.2d 22, 28 (Ind. App. 2001) (warrantless search following arrest inside home unreasonable when conducted pursuant to "standard operating procedure").

At the suppression hearing, the officers testified that they had been unfamiliar with the defendant prior to their surveillance of his residence. They were unaware of whether he had any

accomplices, and their investigation revealed no persons living at that address who may have been armed or involved in the drug trade.[14] Cf. *United States v. Wilson*, supra, 306 F.3d 239 (arrestee suspected of armed assault had unknown accomplice who also had been armed); *United States v. Biggs*, 70 F.3d 913, 916 (6th Cir. 1995) (officers had received information that another person would be meeting defendant at motel room and officers knew arrestee had been arrested on two previous occasions in presence of someone possessing firearm), cert. denied, 516 U.S. 1139, 116 S. Ct. 971, 133 L. Ed. 2d 891 (1996); *United States v. Henry*, supra, 48 F.3d 1284 (informant had advised police that arrestee's "'boys'" or "'counterparts'" might be with him); *United States v. Kimmons*, supra, 965 F.2d 1009 (arresting agents had knowledge of conspirator whose identity and whereabouts were unknown); *Buie v. State*, 320 Md. 696, 705, 580 A.2d 167 (1990) (arrestee had suspected accomplice who also had been armed), cert. denied, 498 U.S. 1106, 111 S. Ct. 1011, 112 L. Ed. 2d 1094 (1991).

Furthermore, the officers' testimony reveals that they had no information that any person who posed a threat to the officers or to others might have been in the apartment at that time. Cf. *United States v. Cavely*, supra, 318 F.3d 996 (entry and visual search of house was reasonable when arrestee had told officers "'a friend'" was inside his house, but friend did not appear or answer when officers knocked on front door, and prior search of residence had discovered firearms); *United States v. Biggs*, supra, 70 F.3d 916 (protective sweep of motel room reasonable when officers had received information that another person would be meeting arrestee there). Dohmann testified that he had

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[14]We note, moreover, that the police did not investigate the name on the parcel, "Sylvia Sloan," beyond their determination that "[t]he name did not coincide with any of the information we found out regarding the apartment."

expected that an armed drug dealer would be in the apartment because he "didn't think it was just a coincidence that this package was being delivered there." On cross-examination, Dohmann acknowledged that this expectation was not a "suspicion"--rather, the officers entered the apartment because "we have to eliminate the possibility . . . of that being there and we didn't want to be surprised."

The generalized *possibility* that an unknown, armed person may be lurking is not, however, an articulable fact sufficient to justify a protective sweep. Indeed, nearly every arrest involving a large quantity of drugs, in or just outside of a home, carries the same possibility. To allow the police to justify a warrantless search based solely upon that possibility would threaten to swallow the general rule requiring search warrants.[15] Furthermore, "allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep." *United States v. Colbert*, supra, 76 F.3d 778. The officers' lack of information "cannot be an articulable basis for a sweep that requires information to justify it in the first place." Id. Accordingly, we conclude that, based on the totality of all the facts and the reasonable inferences drawn therefrom, the warrantless search of the defendant's apartment was not a

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[15]Although we acknowledge the state's concern that "firearms are ubiquitous in the drug trade and . . . drug dealers are often prone to violence," this observation, alone, is not an articulable fact sufficient to support a reasonable belief, as required by *Buie*, that the defendant's apartment harbored a person who posed a danger to the safety of the arresting officers or others on the scene. "[J]ustifying a search because drug related arrests are dangerous would permit wholesale abrogation of the Fourth Amendment reasonableness requirement . . . ." (Internal quotation marks omitted.) *United States v. Colbert*, supra, 76 F.3d 778 n.2.

justifiable protective sweep under *Buie*.

We disagree with the state's contention that *United States v. Oguns*, supra, 921 F.2d 446-47, compels us to reach a different conclusion.[16] In *Oguns*, an informant told customs agents that a woman had instructed him to deliver a quantity of heroin from Nigeria to the defendant or to the defendant's brother in New York. Id., 444. The agents had the informant telephone the defendant, in their presence, and arrange a delivery. The two men spoke in a Nigerian dialect, which the agents did not understand. The informant then told the agents that the defendant had instructed him to bring the "'stuff'" to his address, and that the defendant's brother might have money when he returned to the apartment on the following day. Id. The agents thereafter conducted a controlled delivery, which resulted in their arrest of the defendant just outside of his apartment. The agents noticed that the door to the defendant's apartment was open, and they conducted a warrantless search of the apartment. Id., 445. The United States Court of Appeals for the Second Circuit upheld the search as a justifiable protective sweep under *Buie*. Id., 446. Specifically, the court stated: "The agents arrested [the defendant] at twilight just outside of a two family house. When the agents entered the lobby of the building, they noticed that the door to the [defendant's] apartment [abutting the hallway] was open. Even though the agents had been told that [the defendant's] brother was not in the apartment, they still could have reasonably believed that others were in the apartment. The agents also could have reasonably believed that people in the apartment saw or

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[16]Similarly, we disagree with the dissent that *Oguns* compels us to decide this case differently. The "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene"; *Maryland v. Buie*, supra, 494 U.S. 334; are not present in this case.

heard them arrest [the defendant] and might jeopardize the agents' safety or destroy relevant evidence." Id., 446-47. Although we agree with the state's contention that *Oguns* is factually similar to the present case, it is sufficiently distinguishable to preclude its application. First, the customs agents knew that the defendant was expecting the delivery of heroin. They also knew that he was working in the drug trade with at least three individuals--his brother, the informant and a woman in Nigeria. Although the informant had told the agents that the defendant's brother would not be home, the agents nonetheless reasonably could have believed that an accomplice was in the apartment at the time of the defendant's arrest. See *United States v. Henry*, supra, 48 F.3d 1284-85 (when police have no way of knowing whether informant was truthful concerning whether third party would be in arrestee's home, it is "unreasonable . . . to expect them to forego the necessary precautions"). In the absence of any such similar knowledge, we decline to apply the reasoning of *Oguns* to the present case.[17]

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[17]The state also contends that, in the present case, the fact that the door to the defendant's apartment was ajar further supports a reasonable belief that a third party was in the apartment. This fact is of minimal value to our inquiry, however, in light of the fact that the defendant had just left his apartment, momentarily, to answer the front door in response to Caruso's knock. Moreover, the state's reliance on *United States v. Biggs*, supra, 70 F.3d 913, is misplaced. In *Biggs*, the arresting officers had other particularized information, in addition to an open door, that supported their reasonable belief that a protective sweep was necessary. Id., 916. Specifically, the officers had received information that another person would be meeting the arrestee in his motel room, and they were familiar with the arrestee and knew that he previously had been arrested in the presence of someone in possession of a firearm. Id. It was within the context of these facts that the court in *Biggs* noted that the arrestee "left the motel room door open so that anyone present in the room had a clear view of the officers, thereby threatening their safety from an unknown person present in the room." Id.; see also *United States v. Henry*, supra, 48 F.3d 1284 (informant told officers that arrestee might have his "'boys'" or "'counterparts'" with him, and "this information, coupled with

Having concluded that the warrantless search of the defendant's apartment was unreasonable under the federal constitution, we now must determine whether the evidence seized should have been suppressed as a consequence of the illegal search. "Under the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality. *Wong Sun v. United States*, [371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)]." (Internal quotation marks omitted.) *State v. Reynolds*, 264 Conn. 1, 42, 836 A.2d 224 (2003). "Application of the exclusionary rule, however, is not automatic. [E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint . . . . *Segura v. United States*, 468 U.S. 796, 805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)." (Internal quotation marks omitted.) *State v. Brocuglio*, 264 Conn. 778, 787, 826 A.2d 145 (2003). "[N]ot all evidence 'is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which [the] instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *State v. Luurtsema*, 262 Conn. 179, 190, 811 A.2d 223 (2002), quoting *Wong Sun v. United States*, supra, 488. "The initial determination is, therefore, whether the challenged evidence is in some sense the product of illegal government activity. *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); see also *State v. Miller*, 29 Conn. App. 207, 216, 614 A.2d 1229 (1992), aff'd, 227 Conn. 363, 630 A.2d 1315 (1993) ([b]ecause the seizure of the gun did not owe

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the arrest just outside the open door, was sufficient to lead a reasonably prudent policeman to fear that he was vulnerable to attack"); *United States v. Oguns*, supra, 921 F.2d 446-47 (open door to defendant's apartment bordering arrest scene accompanied by other facts in case supported reasonable belief).

its origin in material part to the [illegal] *Terry* stop, the *Terry* stop cannot provide a basis for excluding the gun from evidence)." (Internal quotation marks omitted.) *State v. Hammond*, 257 Conn. 610, 627, 778 A.2d 108 (2001).

In the present case, the state does not challenge the defendant's claim that the evidence seized must be suppressed as the "fruit" of the warrantless search of his apartment, if that search had been constitutionally impermissible. Nor has the state contended that this evidence inevitably would have been discovered, in the absence of the warrantless search. See *State v. Cobb*, 251 Conn. 285, 337-39, 743 A.2d 1 (1999) (evidence is not excluded if obtained independently of illegal police conduct, or inevitably would have been discovered), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). Therefore, its suppression was warranted.

The judgment is reversed and the case is remanded to the trial court with direction to grant the defendant's motion to suppress.

In this opinion SULLIVAN, C. J., and VERTEFEUILLE and ZARELLA, Js., concurred.

BORDEN, J., dissenting. I disagree with the conclusion of the majority that the facts of the present case do not come within the so-called second tier protective sweep permitted under *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).[1] I conclude, to the contrary, that those facts bring

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[1]I agree with the majority that: (1) the facts of this case do not bring it within the so-called first tier protective sweep under *Buie*; and (2) the second tier protective sweep under *Buie* is not confined to a sweep following an arrest within the home, but also extends to a sweep inside the home following an arrest in an area close to but outside the home, as in the present

this case squarely within that doctrine and that, therefore, the seizure of the crack cocaine, which was in plain view in the bedroom of the defendant, Michael Spencer, did not violate his rights under the fourth amendment to the United States constitution.[2] Accordingly, I would affirm the trial court's judgment because, in my view, that court properly denied the defendant's motion to suppress.

As the majority aptly notes, for a protective sweep such as was undertaken in the present case to be permissible under the fourth amendment, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry*[3] and *Long*,[4] and as in those cases, we think this balance is the proper one." Id., 334.

It is important to emphasize that, in the application of

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case.

[2]I would also conclude that there are no persuasive reasons to conclude that our state constitution affords any more expansive protections against protective sweeps than those articulated in *Maryland v. Buie*, supra, 494 U.S. 325. I would, therefore, also conclude that the seizure in the present case was permissible under our state constitution.

[3]*Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (fourth amendment permits patdown of person on basis of specific facts and reasonable inferences that individual is armed and dangerous).

[4]*Michigan v. Long*, 463 U.S. 1032, 1049-50, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (fourth amendment permits limited search of automobile passenger compartment on basis of specific facts and reasonable inferences that individual may gain access to weapons).

*Buie*, the applicable standard under the fourth amendment is objective, not subjective. That is, the question is whether, as *Buie* itself states, the articulable facts and reasonable inferences "*would warrant a reasonably prudent officer in believing* that the area to be swept harbors an individual posing a danger to those on the arrest scene." (Emphasis added.) Id. Thus, the standard does not focus on the subjective beliefs of the particular police officers, and how they might characterize them, such as a hunch, belief, suspicion, or other characterization. Furthermore, the application of an objective, rather than a subjective, standard requires that a reviewing court employ, not only the reasonable inferences that the police officers on the scene may have in fact drawn, but also those reasonable inferences that *a reasonably prudent police officer*, in the position of the police officers on the scene, *would be warranted in drawing, irrespective of whether those officers in fact drew or articulated them*. Put another way, as the Court of Appeals of Maryland concluded after the remand to it by the United States Supreme Court in *Buie* itself: "The experience and training of the particular police officers involved will form a part of the matrix of facts that define the circumstances which must be considered, but the test is whether a reasonably prudent police officer, under those circumstances, is justified in forming a reasonable suspicion that the house is harboring a person posing danger to those on the arrest scene." *Buie v. State*, 320 Md. 696, 703, 580 A.2d 167 (1990).

This objective standard is clear both from the language of *Buie* itself, as indicated previously, and also from its reliance on *Terry* and *Long*, both of which impose an objective, rather than a subjective, standard. See *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ("the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger"); *Michigan v. Long*, 463 U.S. 1032, 1050, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (same).

This application of the objective standard has long been uniform in fourth amendment jurisprudence. See, e.g., *Horton v. California*, 496 U.S. 128, 138, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by . . . a valid exception to the warrant requirement."); *Maryland v. Macon*, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) ("[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' . . . and not on the officer's actual state of mind at the time the challenged action was taken" [citation omitted]); *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) ("the fact that the officer does not have the state of mind which is hypothe[sized] by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"). Our own cases also recognize this fundamental principle of fourth amendment jurisprudence. See *State v. James*, 261 Conn. 395, 415, 802 A.2d 820 (2002) ("Probable cause exists when the facts and circumstances within the knowledge of the officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed. . . . The probable cause test then is an objective one." [Internal quotation marks omitted.]); *State v. Lipscomb*, 258 Conn. 68, 75, 779 A.2d 88 (2001) ("[r]easonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have

had that level of suspicion" [internal quotation marks omitted]); *State v. Eady*, 249 Conn. 431, 441, 733 A.2d 112 ("[t]he United States Supreme Court has endorsed an objective standard, noting that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer'"), cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999).

With this legal background in mind, I turn to the facts of the present case, which I am compelled to repeat in some detail because there are several critical facts, and the inferences rationally drawn therefrom, that the majority simply ignores in its application of the *Buie* principle. First, the package originally destined for the defendant's address contained *twenty-seven pounds* of marijuana. This permitted the reasonable inference that a large-scale illegal drug selling operation was being conducted at that address. The large amount of illegal drugs involved justifies, indeed compels, the inference that this was a shipment made for the purposes of a large-scale commercial operation. One does not ordinarily have twenty-seven pounds of marijuana shipped to oneself through Federal Express for purely personal use.

Second, the facts and circumstances, together with their rational inferences, permitted the reasonable belief that the defendant was in fact the intended recipient of the package. The defendant accepted the package despite the fact that it was not addressed either to him or to his wife. In fact, the investigation prior to the controlled delivery disclosed that no one with the name of the addressee lived at that address; yet, the defendant

accepted delivery of the package.[5] After the defendant was placed under arrest, the defendant denied knowledge of anyone named Sylvia Sloan, the addressee of the package. One ordinarily does not accept a package addressed to a person with whom one was not acquainted. Thus, it was reasonable to believe that the defendant was in fact the intended recipient, and knowingly accepted delivery, of a package addressed to a fictitious person, which the defendant believed would contain twenty-seven pounds of marijuana, and that the defendant was, therefore, part of a large-scale illegal drug selling operation located in his apartment at that address. This inference was buttressed by the defendant's furtive and suspicious conduct immediately after accepting the package, namely, reopening the door and looking up and down the street. In addition, the area around the defendant's address was known to the police as an area with a high level of drug activity. This further buttressed the reasonableness of the inference that drug selling was going on at that address.

Third, it was reasonab! to believe that the defendant was

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[5]The majority's reference to the fact that the arresting officers did not investigate the name of the addressee of the parcel; see footnote 14 of the majority opinion; both ignores the testimony of police sergeant Eugene Dohmann, and is legally irrelevant. Dohmann testified that the police officers did not expect the package to be traced back to the addressee because "it's typically not done that way for obvious reasons," namely, that neither trained police officers nor even laypersons of common sense would ordinarily expect a drug seller to arrange for twenty-seven pounds of an illegal substance to be delivered to him under his given name. It is legally irrelevant because the fourth amendment focuses, not on what the facts and inferences do *not* establish, but on whether, under the objective test, those facts and circumstances *would* warrant a *reasonably prudent officer* in engaging in the protective sweep. Certainly, as indicated previously in this opinion, the fact that the defendant accepted the package, addressed *not* to him or his wife, permitted the reasonable inference that the package was being sent to the defendant under a fictitious name.

not the only occupant of the apartment in which the illegal drug selling operation was being conducted. The police knew, from the domestic disturbance call just two months before, that the defendant's wife lived there, as well as the defendant. Moreover, it is certainly a rational, objective inference that one does not ordinarily conduct a large-scale illegal, commercial drug selling operation as a sole proprietor, without another participant or employee. This permitted the reasonable inference that someone in addition to the defendant, including his wife or the yet-to-be-identified Sylvia Sloan, was likely to be part of the illegal drug selling operation being conducted out of the defendant's apartment. In addition, the defendant did not respond to the police officers when they repeatedly asked him whether anyone else was in the apartment. Despite the majority's misplaced reliance on *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), which I discuss later in this opinion, this reinforced the inference that, at the time of the defendant's arrest, someone else was in fact in the apartment, who was also involved in the drug operation.

Fourth, it was reasonable for the police to believe that guns or other dangerous weapons would be located in the apartment and, therefore, posed a danger to them from use by a coparticipant with the defendant in the drug operation. We have often stated, as the police officers testified in the present case, that it is reasonable for police officers to suspect guns to be associated with illegal drug selling operations. *State v. Clark*, 255 Conn. 268, 284, 764 A.2d 1251 (2001) ("Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms" [internal quotation marks omitted]); see also *United States v. Wilson*, 306 F.3d 231, 238 (5th Cir. 2002) (dealing in narcotics sufficient for reasonable belief in potential for violence and presence of weapon).

Fifth, the door to the defendant's apartment was ajar, and was only fourteen or fifteen stairway steps away from the police officers and the defendant. This permitted the reasonable inference that the police officers were in a place where they would have a justified fear for their safety from any accomplice of the defendant in the apartment, who was likely to have been aware of the defendant's arrest.

Sixth, as the trial court, which is the sole arbiter of credibility in this case, specifically found, the police entered the apartment for the purpose of searching for weapons or other persons, the "safety of officers [being] paramount." Thus, in effect, the court found that the police had a subjective fear that someone else located in the apartment was a likely source of danger to them, and acted to alleviate that fear. This finding is conclusive on the question of the purpose of the protective sweep involved.

In sum, the police officers had reasonable and articulable suspicion: that the defendant was the intended recipient of the package containing twenty-seven pounds of marijuana, and was therefore involved in a large-scale, commercial, illegal drug selling enterprise; that someone else, who may or may not have been his wife,[6] and who also was involved in the enterprise, was

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[6]In my view, the majority's reliance on *United States v. Akrawi*, 920 F.2d 418 (6th Cir. 1990); see footnote 13 of the majority opinion; for the proposition that the presence of the defendant's girlfriend and his accomplice's mother is insufficient to establish a reasonable belief that dangerous persons are on the premises, is unpersuasive. First, that was not the focus of the court's opinion in *Akrawi*. In that case, the agents already had entered the residence and identified the accomplice's mother as present before the protective sweep took place. *United States v. Akrawi*, supra, 419. Thus, she was a known entity, and I do not read *Akrawi* as indicating that the government's reliance on a known presence as a source of a reasonable suspicion is akin to the risk posed from an unknown potential accomplice, as in the present case.

in the apartment; that that person was likely to be armed; and that the door to the apartment, which was but fifteen steps from the site of the defendant's arrest, was ajar, and, therefore, the armed person was likely to be aware of the arrest. On the basis of these facts and inferences, the conclusion is inescapable that there were "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent police officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, supra, 494 U.S. 334. That is what *Buie* requires, and it is all that *Buie* requires.

Indeed, the United States Court of Appeals for the Second Circuit has come to the same conclusion in a case almost identical to the present one. In *United States v. Oguns*, 921 F.2d 442, 444 (2d Cir. 1990), federal customs agents apprehended Saka Adenrele, who had arrived at John F. Kennedy International Airport from Nigeria carrying 1405 grams of heroin in his underwear. After Adenrele told the agents that the heroin was to be delivered to the defendant or his roommate, Timo, and Adenrele agreed to cooperate, the agents arranged a controlled delivery by Adenrele to the defendant at the defendant's

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Second, the majority's focus on the defendant's wife, coupled with its lack of focus on the police officers' knowledge that the defendant resided with his wife, simply ignores the reasonable inference that the defendant was not operating as a sole proprietor. Indeed, the potential existed that another person may have been participating in the defendant's large-scale drug selling operation, who may or may not have been his wife.

Finally, the fifteen to eighteen agents that entered the defendant's apartment in *Akrawi* remained there for forty-five minutes after arresting the defendant and identifying the other occupants. Id., 420-21. That fact, in the court's view, belied the agents' contention that the sweep was purely conducted for safety purposes. Id. Thus, as a factual matter, the sweep in *Akrawi* did not resemble either the sweep in *Buie* or the sweep in the present case.

apartment. Id., 444-45. In a telephone call to the defendant, the defendant told Adenrele that he did not have any money but that Timo would have the money when he returned the next day, and the defendant suggested that Adenrele come to his apartment and spend the night there. Id., 444. In a second telephone conversation one-half hour later, the defendant told Adenrele that he would be waiting for Adenrele outside his home wearing a pair of shorts. Id., 445. The agents prepared a sample of the heroin, and put it in a tote bag for Adenrele to carry. Id. Adenrele rode in a taxicab driven by an agent to the defendant's home, where the defendant was sitting on the front steps of a two-family house. Id., 444-45. The defendant approached the taxicab and paid the fare, and then he and Adenrele walked toward the building, with Adenrele carrying the tote bag that contained the sample of heroin. Id., 445. At that point, the agents arrested the defendant. Id. One of the agents, seeing an open apartment door abutting the hallway inside the building, asked the defendant if that was the door to his apartment. The defendant responded that it was. Id. The agents then conducted a security sweep of the apartment. Id.

The defendant challenged the legality of the security sweep as a predicate for his challenge to a subsequent consensual search of the apartment. Id., 446. The Court of Appeals rejected the challenge, stating: "Applying [*Buie*] to the agents' security sweep of the [defendant's] apartment, we conclude that the agents' actions did not violate [the defendant's] Fourth Amendment rights. The agents arrested [the defendant] at twilight just outside of a two family house. When the agents entered the lobby of the building, they noticed that the door to the [defendant's] apartment was open. Even though the agents had been told that [the defendant's] brother was not in the apartment, they still could have reasonably believed that others were in the apartment. The agents also could have reasonably believed that people in the apartment saw or heard them arrest

[the defendant] and might jeopardize the agents' safety or destroy relevant evidence. Had third parties been in the apartment, they would likely have been able to hear through the open door the agents arresting [the defendant] and, with that knowledge, would have posed a threat to the police outside. In view of the circumstances confronting the officers and the fact that the [D]istrict [C]ourt's factual findings were not clearly erroneous, we hold that the security sweep met the Fourth Amendment requirements specified in *Buie* . . . ." Id., 446-47.

Despite the majority's attempt to distinguish this case, I can find no distinguishing features. In both the present case and *Oguns*: (1) a large amount of illegal drugs were destined for the defendant at his address; (2) there was no certainty that anyone else was in the apartment--indeed, in *Oguns*, unlike the present case, there was specific evidence that the only other known inhabitant was *not* therein; (3) there was no specific evidence that whoever might be in the apartment would be armed; and (4) the defendants were arrested outside the apartment, and the door to the apartment was ajar, indicating that anyone inside would know of the arrest. Nonetheless, in both cases the police officers reasonably could have believed that others were in the apartment who (1) would be likely to know of their accomplice's arrest, and (2) would pose a danger to the arresting officers; and in both cases, therefore, the requirements of *Buie* were met. See also *United States v. Cavely*, 318 F.3d 987, 996 (10th Cir. 2003); *United States v. Wilson*, supra, 306 F.3d 238-39; *United States v. Howard*, 106 F.3d 70, 74-75 (5th Cir. 1997); *United States v. Biggs*, 70 F.3d 913, 916 (6th Cir. 1995). Although opinions of the Court of Appeals for the Second Circuit are not binding on this court, we have consistently held that they are persuasive and are entitled to significant deference. See *Turner v. Frowein*, 253 Conn. 312, 340-41, 752 A.2d 955 (2000) ("In general, we look to the federal courts for guidance in resolving issues of federal law. . . . Decisions of the Second Circuit Court of Appeals,

although not binding on us, are particularly persuasive. 'In deciding to adopt the analysis of the Second Circuit Court of Appeals, we recognize that the decisions of the federal circuit in which a state court is located are entitled to great weight . . . .'" [Citations omitted.]). *Oguns* is undeniably within that category, particularly because the present case is resolved on the basis of the federal constitution.[7]

The majority opinion is fundamentally flawed. First, as I indicated previously, it fails to apply the objective test required by established fourth amendment jurisprudence and, therefore, fails to account, not only for critical undisputed facts, but for critical reasonable inferences to be drawn from those facts. In effect, it focuses, wrongly, on what was *not specifically established* by the evidence, rather than, correctly, on the reasonable inferences to be drawn from what *was undisputedly established* by the evidence. In this regard, rather than focus, collectively, on the facts and inferences established by the evidence, the majority selectively chooses particular facts, views each in isolation, and then states that each fact provided an insufficient basis on which to sweep the defendant's apartment. Such a piecemeal approach is inconsistent with accepted fourth amendment jurisprudence.

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[7]Indeed, if anything, the present case is an a fortiori case compared to *Oguns*. In the present case, although the majority does not, I specifically refer to the well established notion that it is perfectly reasonable for the police to believe that persons involved in drug selling are likely to be armed. The court in *Oguns* did not even mention that association in upholding the validity of the sweep under *Buie*. In addition, the police officers in the present case knew that the defendant was not the only tenant of the apartment, and he remained silent when asked if anyone else was on the premises. In *Oguns*, the agents were specifically told that the defendant's brother was not in the apartment, and the court nonetheless held that the police did not have to credit that representation. *United States v. Oguns*, supra, 921 F.2d 446.

Thus, in my view, the majority oversteps this court's proper bounds in its application of the *Buie* principle. It is well established that a state court cannot apply federal constitutional standards more broadly than applied by the United States Supreme Court. *Oregon v. Hass*, 420 U.S. 714, 719, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) ("of course, a [s]tate may not impose . . . greater restrictions as a matter of federal constitutional law when this [c]ourt specifically refrains from imposing them"). The majority's application of *Buie* to the undisputed facts and reasonable inferences of the present case violates this precept. In doing so, moreover, the majority strips law-abiding police officers of the legitimate safety net that *Buie* provides, and tells them that, in a situation like this, in which an abundance of facts and inferences gives them the reasonable and articulable suspicion that their lives or those of the public are in danger, they must, if they are to obey the law, forgo their, and the public's, legitimate safety concerns.

Second, the majority's reliance on the fact that the defendant had been given *Miranda* warnings before he failed to answer the police officers' questions about whether anyone else was in the apartment is simply irrelevant to the fourth amendment analysis under *Buie*. *Miranda* is a prophylactic exclusionary rule of evidence regarding the admissibility of confessions at trial, based upon the federal constitution's fifth amendment proscription against compelled self-incrimination. See *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). I know of no authority, nor do the cases cited by the majority establish, that *Miranda* informs the reasonableness of a security sweep under the fourth amendment.[8]

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[8]To the extent that the concerns of *Miranda might* apply to the protective sweep in the present case, a lack of administering the warnings would likely come within the public safety exception to *Miranda*, which permits such interrogation for purposes of immediate protection of the officers

Indeed, it would be bizarre to hold that it does, because it would then bar law enforcement officers, who are required to give a defendant his *Miranda* warning upon arresting and questioning him, from then asking him, for their own protection and the protection of the public, whether anyone else is in his apartment. Indeed, the majority's point that silence after such warnings is "insolubly ambiguous" is also beside the point. (Internal quotation marks omitted.) A defendant's silence has been said to be "ambiguous" as it relates to a jury's ability to draw an inference therefrom at trial; see *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); it does not play a role in determining the reasonableness of police conduct.[9] The fact that it may be ambiguous--meaning that it is susceptible of more than one plausible meaning--does not mean that the police cannot choose the more prudent meaning, and act on that choice for their own safety and the safety of others.[10] In the fourth

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and the surrounding public. See *State v. Betances*, 265 Conn. 493, 502-503, 828 A.2d 1248 (2003); see also *New York v. Quarles*, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). This point is purely hypothetical, however, because the defendant in the present case was given *Miranda* warnings.

[9]As the majority itself recognizes with its citation to *United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991), even if the defendant had responded "no" to the officers' questions about whether there were other persons in his apartment, the officers may nonetheless, in their specialized judgment, reasonably elect to sweep the premises. See also *United States v. Oguns*, supra, 921 F.2d 446 (agents were told that defendant's roommate was not in apartment).

[10]In the present case, the defendant accepted a package originally containing twenty-seven pounds of marijuana. Upon his arrest, the defendant denied that he knew the addressee of the package, and then refused to answer the police officers' questions regarding whether anyone else was in the apartment. It is contrary to common sense to suggest, as the majority does, that the arresting officers could not consider the defendant's silence in

amendment context, the objective test requires the reviewing court to give deference to the reasonable inferences drawn or drawable by the police officer involved that support the legitimacy of the search and seizure, irrespective of whether other reasonable inferences could also have been drawn that would undermine that legitimacy.

I conclude that the trial court properly denied the defendant's motion to suppress, and would affirm the judgment of the trial court. I therefore dissent.

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response to their questions as one of many factors in determining whether the protective sweep was reasonable to ensure their own safety and the safety of others.

**SUPREME COURT**
**STATE OF CONNECTICUT**

**NO. SC. 17045**

**STATE OF CONNECTICUT**
**v.**
**MICHAEL SPENCER : JUNE 2, 2004**

**ORDER**

THE MOTION OF THE APPELLEE-STATE OF CONNECTICUT, FILED MAY 3, 2004, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.*

*BORDEN, NORCOTT, AND PALMER, JS., WOULD GRANT.

BY THE COURT
/s/ Michele T. Angers

_____
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No. 04-282

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In The

# Supreme Court of the United States

STATE OF CONNECTICUT,

*Petitioner,*

v.

MICHAEL SPENCER,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut**

## RESPONDENT'S REPLY TO STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

The Connecticut Supreme Court in a factually based opinion correctly applied the principles enunciated by this Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990) and reversed the respondent's conviction for possession of a narcotic substance. The case was remanded to the trial court with direction to grant the respondent's motion to suppress, *State v. Spencer*, 268 Conn. 575 (2004) (hereinafter *State v. Spencer*, as printed in petition of writ for certiorari, at A-1).

## JURISDICTION

The trial court's decision was reversed by a four to one majority of the Connecticut Supreme Court. The decision below was released on April 27, 2004. By a four to three vote, the petitioner's motion for reargument and reconsideration *en banc* was denied on June 2, 2004. *See* Appendix at A-42. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rules 10(b) and 10(c).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The respondent, Michael Spencer, was arrested after a "controlled delivery" in which he signed for a Federal Express parcel containing marijuana. The parcel was not addressed to the respondent but had been sent to the three-family apartment building where the respondent and his wife resided on the second floor. The police arrested the respondent as he exited the front door of the building. Police found the Federal Express parcel placed by the respondent on a shelf in the common hallway. The respondent's apartment was at the top of a flight of twelve to fourteen stairs. The respondent remained silent after being arrested, handcuffed and Mirandized. The police claimed that the door to the respondent's apartment was ajar. The police executed a warrantless search of the respondent's second floor apartment. They observed a crack pipe and crack cocaine within a folded dollar bill on

the respondent's bed. At trial, the respondent challenged the legality of the search and seizure and sought to suppress the crack cocaine seized as a result.

The State of Connecticut charged the respondent with one count of possession of marijuana with intent to sell and one count of possession of crack cocaine. A jury of six returned a guilty verdict to the count charging possession of crack cocaine, and a not guilty verdict to the count charging possession of marijuana with intent to sell.

### A. The Delivery, Arrest and Warrantless Search

On April 12, 2000, the sheriff's office of Shelby County, Tennessee notified the Stamford, Connecticut Police Department that it had intercepted a Federal Express parcel containing approximately twenty-seven pounds of marijuana. *State v. Spencer*, at A-5. The parcel was addressed to "Sylvia Sloan" at 16 Lipton Place, Stamford, CT. *Id.*[1] The Connecticut Supreme Court noted that the police did not investigate the name on the parcel "Sylvia Sloan" beyond their determination that "the name did not coincide with any of the information we found out regarding the apartment." A-22, Footnote 14. On the basis of this information Stamford police surveilled the residence and observed that it appeared to be multi-family house. *Id.*

Nobody by the name of Sloan was known to reside at that address at the time. *Id.* Police records disclosed that in the past Stamford police had responded to a domestic

[1] At trial, various witnesses referenced to the name on the parcel as "Sylvia Sloan", "Sylva Sloan" or "Sylvoan Sloan". A-5.

disturbance call that involved the respondent and his wife, both of whom resided on the second flood. *Id.*

The following morning, April 13, 2000, the police took possession of the Federal Express parcel from the Stamford Federal Express office. *Id.*, at A-5 to A-6. A police officer posing as a Federal Express deliveryman, rang the doorbell to the first floor apartment and knocked on the outer door of the building. *Id.*, at A-6. Spencer came down from his apartment on the second floor and opened the door. *Id.* Spencer verified the address and told the officer that his name was Michael Spencer and he lived on the second floor. *Id.* The officer told Spencer that the delivery was for "Sylvia Sloan" and Spencer repeated the name to himself and then told the officer he would accept the parcel. *Id.*, at A-6. The respondent Spencer signed the delivery invoice, took possession of the parcel, went inside and closed the front door. *Id.*, at A-6. As the delivery officer walked away, Spencer came out of the building without the parcel, and looked up and down the street. *Id.*

At this point, arresting officers approached Spencer in the front doorway of the multi-family home. *Id.* Officers identified themselves, brought Spencer back into the common hallway and observed the Federal Express parcel which had been left on a common shelf where the building's tenants left mail. *Id.*

The officers then read Spencer his *Miranda* rights and placed him under arrest. *Id.* Spencer denied knowledge of the contents of the package or of any one named Sylvia Sloan; he claimed that he innocently had accepted the parcel. *Id.*, at A-6 to A-7.

From the bottom of a stairway of approximately twelve to fourteen steps leading up to the second floor the

officers could see that the door to Spencer's apartment was ajar. *Id.*, at A-7. An officer asked Spencer if anybody else was inside the apartment and received no response. *Id.* Officers subsequently ascended the stairs and entered Spencer's apartment. *Id.* In the defendant's bedroom, officers observed on Spencer's bed a homemade crack pipe and a dinner plate containing crack cocaine residue, as well as a rolled up dollar bill containing crack cocaine. *Id.*

**B. The Suppression Hearing**

At the trial the respondent filed a motion to suppress the evidence of the crack cocaine claiming that such evidence had been obtained as a result of an unconstitutional warrantless search. *State v. Spencer*, at A-7 to A-8. During the suppression hearing, four arresting officers testified. *Id.*

An officer testified that after the arrest the respondent was unresponsive and nervous and that the apartment was searched because of the belief that another person was inside the apartment and out of concern that weapons might be present. *Id.*, at A-8 to A-9. The officer went on to say that this was "standard procedure" and "you have to do what you have to do." *Id.*, at A-9. Upon cross-examination, this officer testified that prior investigation revealed that no person named Sloan lived at 16 Lipton Place; his investigation did not reveal any indication that an individual at that address might be armed or involved in the drug trade. *Id.* Finally, the officer testified that the sweep was performed to "eliminate the possibility" and "we didn't want to be surprised." *Id.*

Other officers indicated that their prior investigation did not reveal any armed or dangerous people at the

address and that they were not aware of anybody in the "immediate area" who might have been "that magnitude of a marijuana dealer." *Id.*, at A-10.

At the suppression hearing the prosecution mistakenly argued that the warrantless search was justified, on various grounds, under *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990). *Id.*, at A-10. Defense counsel recognized *Buie* however distinguished this case in that in *Buie* officers were armed with a search warrant and that officers had a reasonable and articulable suspicion of an armed accomplice in *Buie*. Neither of these elements were fulfilled in the present case. *Id.*, at A-11.

The trial court, acting upon *Maryland v. Buie*, denied the motion to suppress. *Id.*, at A-11.

### C. The Connecticut Supreme Court Decision

The respondent appealed to the Connecticut Supreme Court. The majority agreed that the warrantless search violated the defendant's right under the Fourth Amendment of the federal constitution. *State v. Spencer*, at A-11 to A-27. The dissent believed that the majority's opinion directly conflicted with the Second Circuit's decision in *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990). *State v. Spencer*, at A-26 to A-41.

The majority held that the warrantless search did not qualify as a second tier protective sweep. *Id.*, at A-17 to A-26. The Connecticut Supreme Court concluded that neither the fact that Spencer did not respond to officers' questions nor that officers had conducted "numerous" or "hundreds" of protective sweeps on prior occasions supported a reasonable belief that the defendant's apartment

harbored a third party posing a danger to those on the arrest scene. *Id.*, at 21. In its reasoning, the majority concluded that the officer's testimony reveals that they had no information that any person who posed a threat to the officers or to others might have been in the apartment at that time. *Id.*, at A-22. The majority indicated that the arresting officers possessed no more than a "generalized possibility" that an unknown, armed person may be lurking within the apartment. *Id.*, at A-23. Additionally, the Court observed that "lack of information cannot provide an articulable basis upon which to justify a protective sweep." *United States v. Colbert,* 76 F.3d 773 (6th Cir. 1996). *Id.*, at A-20 to A-24.

The majority then concluded by indicating that to allow the police to justify a warrantless search based solely upon that possibility of an armed individual within the premises would threaten to swallow the general rule requiring search warrants. *Id.*, at A-23. Furthermore, "allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house." *Id.*, at A-23. The officers' lack of information "cannot be an articulable basis for a sweep that requires information to justify it in the first place". *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996).

## REASON FOR DENYING THE WRIT OF CERTIORARI

### I. THIS COURT SHOULD DENY CERTIORARI IN THIS CASE. THE CONNECTICUT SUPREME COURT VALIDLY FOLLOWED THE PRINCIPLES OUTLINED IN *MARYLAND V. BUIE* AND IN A DECISION BASED ON THE TOTALITY OF ALL FACTS HELD THAT THE WARRANTLESS SEARCH OF THE PREMISES WAS NOT A JUSTIFIABLE PROTECTIVE SWEEP.

The Connecticut Supreme Court declined to adapt a new rule of law and applied the exact law in complete accord with the requisites as set forth by this Court in *Buie*. *Id.*, at A-19 to A-24. This Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), enunciated a concrete doctrine in two levels which could validate a warrantless protective sweep. Under the first tier as an incident to a lawful arrest, officers could as a precautionary matter and without probable cause or reasonable suspicion, look into closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. *Maryland v. Buie*, 494 U.S. at 334. Under the second tier of *Buie*, the Court concluded: "Beyond that officers can search areas not adjacent to the place of arrest if there are particular facts which taken together with rational inferences from these facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to the officers." *Id.*, at 334-336.

### A. The Connecticut Supreme Court applied a clearly focused objective standard basing their decision on the lack of articulable suspicion as testified to by all of the arresting officers.

The state argues that the majority of the Connecticut Supreme Court erred in its decision-making process by applying an improper subjective standard criteria. This is a myopic argument in that the Connecticut Supreme Court notes that the officer's testimony revealed no information that any person who posed a threat might have been in the apartment and that police held no more than a generalized possibility that an unknown, armed person may be lurking about. *Id.*, at A-22 to A-23. In its reliance on the cornerstones enunciated by this Court in *Buie*, the Connecticut Supreme Court notes that "it is the state's burden to demonstrate that the officers had a reasonable basis for believing" that a third party in the basement might attack them or otherwise interfere with the arrest. *Id.*, at A-18 to A-19. The Connecticut Supreme Court also adhered to this Court's holding that there must be articulable facts which, taken together with rational inferences from those facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scent. *Id.*, at A-19 to A-20.

The Connecticut Supreme Court continued in their objective evaluation of the officer's testimony in following the guidelines as set forth in *United States v. Colbert*, 76 F.3d 778. The Connecticut court correctly considered that the officer's lack of information cannot be an articulable basis for a sweep that requires information to justify it in the first place. *Id.*, at A-23.

Recognizing the often competing interest of the individual's expectation of privacy and officer's safety, the Connecticut Supreme Court correctly evaluated the proper procedure for affecting a second tier *Buie* protective sweep. The procedure must include articulable facts – that when taken together with rational inferences would form a basis of knowledge to legitimize a protective sweep. Again – lack of information (concerning the presence of a third party) cannot provide an articulable basis upon which to justify a protective sweep. *United States v. Colbert*, *supra*, 778.

The majority also considered investigating officers' testimony indicating their lack of knowledge and unfamiliarity with the respondent in concert with their total lack of information of whether Spencer had anyone else within his residence. *Id.*, at A-22. The Court considered that the officers testified that they had no knowledge of any persons living at that address who may have been armed nor did they have any information of anyone there involved in the drug trade. *Id.*, at A-22. Rather, upon cross examination, a testifying officer indicated that "we didn't want to be surprised." *Id.*, at A-23.

The Connecticut Supreme Court took particular note in its decision of the following colloquy with a testifying officer:

> **Q.** There came a time when you went up the stairs to go into (the defendant's) home –
>
> **A.** Uh-huh.
>
> **Q.** – and again, you had a suspicion that there were – you had a suspicion that there could be somebody armed upstairs?

**A.** A suspicion? I wouldn't say a suspicion but we had to know.

**Q.** A hunch?

**A.** Our suspic – not a hunch. Just, you don't even think about it. You just have to eliminate – we have to eliminate the possibility so we went up there with the possibility of that being there and we didn't want to be surprised. *Id.*, at A-9.

There is no question that when arresting officers have articulable facts that would warrant a reasonably prudent officer to believe that an area harbors an individual who may pose a danger that *Buie* would allow for a second tier protective sweep. It is just as certain however that in the absence of articulable facts, as in the case before this Court, the cornerstones enunciated in *Buie* demand more than:

You don't even think about it . . . we have to eliminate the possibility . . . we didn't want to be surprised. *State v. Spencer*, 268 Conn. 575, 583 (2004). *Id.*

To allow the police to justify a warrantless search based solely upon that possibility would threaten to swallow the general rule requiring search warrants. *United States v. Colbert, supra*, 76 F.3d 778; *Id.*, at A-23.

### B. The Connecticut Supreme Court correctly determined that the respondent's silence, relying upon his rights granted in *Miranda v. Arizona*, was of minimal value in determining the basis for a protective sweep.

The majority correctly concluded in *Spencer* that the respondent's silence was not "sufficiently specific and

articulable to support a reasonable belief that the [respondent's] apartment harbored a third party posing a danger to those on the arrest scent." *Id.*, at A-21 to A-22. The majority also correctly concluded that the respondent's failure to respond to the officer's questions may have stemmed from a desire to invoke his *Miranda* rights. *Id.*, at A-21.

Certainly the respondent's silence in the wake of being "Mirandized" gave arresting officers no additional information or basis of knowledge to articulate a reasonable suspicion that persons inside the home were armed and posed a danger. More telling was the majority's reliance on officers' testimony that the protective sweep was their "standard procedure" and such searches had been conducted "numerous" or "hundreds" of times on prior occasions. *Id.*, at A-20 to A-21.

Applying this lack of a standard, that a protective sweep was not based upon any articulable suspicion but rather was generalized standard policy has been held by our courts to provide no basis to substantiate a reasonable belief for a second tier sweep. *See United States v. Brown*, 69 F. Supp. 2d 925, 931 (E.D. Mich. 1999) (protective sweep conducted "as a matter of course" unreasonable under *Buie*); *State v. Estep*, 753 N.E.2d 22, 28 (Ind. App. 2001) (warrantless search following arrest inside home unreasonable when conducted pursuant to "standard operating procedure").

Clearly the majority's decision and their consideration of insoluble ambiguities following post-arrest silence weighs the privacy expectation of the individual versus the oft times hazardous scenarios faced by police officers. By clearly outlining the two level tiers of *Buie*, the Connecticut

Supreme Court gave the appropriate guidance in demanding that police officers have an articulable basis upon which to justify a protective sweep and a caveat as to not purposely remain ignorant as an incentive to base warrantless home searches. *Id.*, at A-20 to A-23.

### C. The Connecticut Supreme Court appropriately determined that the warrantless search did not constitute a valid protective sweep and gave diligent due accord to the Second Circuit Court of Appeals case of *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990).

The Connecticut Supreme Court found that the *Oguns* case was "sufficiently distinguishable" as to preclude its application to *Spencer*. *Id.*, at A-25. In *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990) an informant, co-conspirator told customs agents that another individual in Nigeria had instructed him to deliver over 1400 grams of heroin to either the defendant Oguns or to Oguns' brother and apartment mate Timo. *Id.*, at 444. In the first of two telephone conversations spoken in a Nigerian dialect, which was not understood by customs agents, the informant was directed by Oguns to deliver the "stuff" to Oguns' address. *Id.* The informant, co-conspirator was told that Oguns would be waiting for him outside of the apartment wearing short pants. *Id.* The agents conducted a controlled delivery outside of Oguns' apartment. *Id.*, at 445. Upon delivery, Mr. Oguns took the informant's garment bag, paid the taxi cab driver and proceeded towards his apartment. *Id.* Olawale Oguns was then arrested just outside of his apartment. *Id.* Seeing an open apartment door just inside the apartment building, one of the arresting agents asked Oguns if that was his apartment. *Id.*

Oguns responded it was and several agents conducted a security sweep of the apartment. *Id.* Olawale Oguns challenged the legality of the "protective sweep" to the United States Court of Appeals for the Second Circuit. Under Oguns' set of circumstances, the Court of Appeals rejected his challenge. In considering the legality of the entry into Oguns' home, the Second Circuit Court began with the axiom that warrantless searches "are per se unreasonable, subject to a few well-delineated exceptions." *United States v. Vasquez*, 638 F.2d 507, 529-30 (2d Cir. 1980) (citing *Schenckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973)), *cert. denied*, 454 U.S. 975, 70 L.Ed. 396, 102 S.Ct. 528 (1981).

The majority of the Connecticut Supreme Court correctly distinguished factually, and ultimately legally, the *Spencer* case from that of *Oguns*. The Connecticut court identified the reasonable and articulable suspicions present in *Oguns* which were obviously lacking in *Spencer*. In *Oguns*, agents knew that the defendant was not only expecting the delivery of heroin from Adrenele but was willing to pay his cab fare upon arrival. *Id.*, at A-36. Additionally, *Oguns* had at least three co-conspirators whom the agents were presently aware of, to wit: his apartment mate and brother, Timo, Adrenele himself and Bola Williams, the woman in Nigeria. *Id.*, at A-25. Agents were also aware that although Oguns had informed Adrenele that Timo was not at home, the federal officers "nonetheless reasonably could have believed that an accomplice was inside the apartment at the time of the defendant's arrest." *State v. Spencer* at A-25. Further articulable suspicion could have been considered in *Oguns'* case which were not present in *Spencer* in that:

1) Investigating agents were not fluent in the Nigerian dialect spoken between the co-conspirators and would have valid suspicions regarding the conversations; A-24.

2) Oguns made it a point to request that Adrenele spend the night at his, Oguns, residence; A-36.

3) Saka Adrenele arrived at John F. Kennedy International Airport on a regularly scheduled flight. Time constraints could have been considered an issue if a warrant needed to be applied for. A-35.

The dissent in the present case concludes that *Oguns* is a case "almost identical" to *State v. Spencer* and that the warrantless search was a legitimate second tier *Buie* sweep. *State v. Spencer* at A-35 to A-38. The dissent goes on to opine that there were no distinguishing features between the two cases. In support of this conclusion, a single justice notes that in both cases: (1) a large amount of illegal drugs were destined for the defendant at his address; (2) there was no certainty that anyone else was in the apartment; (3) there was no specific evidence that whoever might be in the apartment would be armed and (4) the defendants were arrested outside the apartment and the door to the apartment was ajar, indicating that anyone inside would know of the arrest. *State v. Spencer* at A-36.

In the case presently before this Court, the Connecticut Supreme Court correctly analogized the reasoning in *Oguns* with the factual scenario as set out by all testifying officers in *Spencer* to disagree with the dissent that articulable facts taken together with rational inferences would warrant a reasonably prudent officer to believe an

area to be swept harbors an individual posing a danger. *Id.*, at A-24.

Based on the facts of the present case, the majority rejected the finding of the dissent as factually different in that:

1) In *Spencer*, the contraband was not known to be going to a specific individual as was obvious in *Oguns* – but rather was being sent to an unknown individual at a multi-family home.

2) The respondent in this case informed the officer that no one named Sloan lived at the home – but he would sign for it.

3) The respondent, Michael Spencer, both informed the officer of his real identity and signed for the parcel under that name.

4) There was never a nexus established between the respondent and the contraband in this case other than his signature. He did not pay any cash or delivery fee to show any interest in the parcel and the respondent in this case left the parcel in a common hallway as he departed the scene. *Id.*, at A-20 to A-26.

## II. THE CONNECTICUT SUPREME COURT CORRECTLY DETERMINED THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID FIRST-TIER PROTECTIVE SWEEP AND THIS COURT SHOULD DENY CERTIORARI AS TO THAT ISSUE.

In *State v. Spencer*, the Connecticut Supreme Court accurately concluded that the warrantless search into the

respondent's home did not qualify as a permissible first tier *Buie* protective sweep. The Court held that within the first tier of protective sweeps, arresting officers can, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces, *immediately adjoining* the place of arrest from which an attack could be immediately launched." (emphasis added) *Maryland v. Buie, supra*, 494 U.S. 334. *Id.*, at A-18. The court in *Spencer* clearly noted that the (respondent) was arrested in a first floor common hallway at the bottom of a stairway of approximately twelve to fourteen steps leading up to his second floor apartment. Therefore, the defendant's apartment cannot be characterized as a space "immediately adjoining" the place of arrest. *Id.*, at A-18. Clearly, the Connecticut Court declined to accept the fiction that a residence across a common hallway, up a flight of stairs and behind a partially closed door could be an area immediately adjoining the place of arrest. Unlike cases as cited by the state: *In Re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998); search justified under hot pursuit exception; *Ortey-Sandoval v. Gormey*, 81 F.3d 891 (9th Cir. 1996); attached garage previously converted into an apartment with open ceiling above defendant's bed; *United States v. Lauter*, 57 F.3d 212, 216-217 (2d Cir. 1995), police obtain warrant to search residence but did not specify defendant's apartment number; and *United States v. Robinson*, 775 F. Supp. 231, 232-235 (N.D. Ill. 1991); defendant "backpeddles" to the wall immediately adjacent to the interior doorway, the respondent in the case before this Court was "controlled" a substantial distance from the entrance to his home while he exited the building.

## CONCLUSION

The respondent, Michael Spencer, respectfully requests this Court to deny certiorari. The Connecticut Supreme Court, in a four to one majority, correctly determined that the state failed in its burden, as evidenced by the testimony of arresting officers, to substantiate a reasonable, articulable basis for a warrantless search of the respondent's home. This Court was very specific in its guidelines as set forth under *Maryland v. Buie*, *supra*, 494 U.S. 325, 110 S.Ct. 1093 (1990) for warrantles home searches. Unquestionably the Connecticut Supreme Court gave due diligence to the parameters limiting the validity of a second tier protective sweep as enunciated in *Buie*. According to the arresting officer's own testimony the protective sweep was done as a matter of "standard procedure" and had been undertaken "hundreds of times in the past."

It is abundantly clear that law enforcement could be made easier and possibly more efficient if the Fourth Amendment was not firmly entrenched in our Constitution. The fact is, however, that our Fourth Amendment guarantees a privacy expectation our citizens have come to expect and demand. The Fourth Amendment to the Bill of Rights cannot be sacrificed to the simplistic overtures of "Standard Procedure."

Respectfully submitted,

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